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No. 95 1133

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. Properties, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated

Petitioners,

v.

CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,

Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 3, 1996

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QUESTIONS PRESENTED FOR REVIEW

1. Whether plaintiffs were denied due process when they were deprived of their claims without being given any notice that their rights could be extinguished.

2. Whether plaintiffs' right to due process was violated when they were deprived of their claims in the district court by a decision of the Oklahoma Corporation Commission that did not have jurisdiction to adjudicate their claims.

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OPINIONS BELOW

The August 30, 1995 opinion of the United States Court of Appeals for the Tenth Circuit is scheduled for reporting and appears in the Appendix at A-1 to A-52. The October 5, 1995 order of the Tenth Circuit denying plaintiffs' petition for rehearing is unreported and appears in the Appendix at A-53 to A-54. The partial summary judgment of the United States District Court for the Western District of Oklahoma is unreported.

JURISDICTIONAL STATEMENT

The Court of Appeals affirmed the judgment of the district court on August 30, 1995 and denied Petitioners' petition for rehearing on October 5, 1995. Jurisdiction of this Court is proper under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Plaintiffs own undivided interests in the gas and oil underlying Section 14 of a spacing unit in Oklahoma for the production of gas. Defendant Conoco owns 37% of the product of that unit and 29% of the interest in adjoining sections. Plaintiffs claimed that (1) the well in the adjacent section 15 was drawing hydrocarbons from Section 14, (2) defendants had a duty to fully develop their leases and protect the well in plaintiffs' section from drainage by the Section 15 well, and (3) defendant Conoco failed to act as a prudent operator.

Each of these oil and gas sections have literally thousands of owners with varying percentages of ownership. In 1992, the Oklahoma Corporation Commission denied an application to drill an additional well in Section 14. Plaintiffs did not take part in the administrative proceedings. (Op. at 4, App. at 5-6.) Defendants moved for summary

judgment on the ground that the decision of the Commission precluded plaintiffs' private claims in the district court. The district court agreed and entered partial summary judgment.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Opinion divests hundreds of thousands of individuals who have legitimate claims against their lessees for fraudulent drainage and breach of fiduciary duty and implied covenants when they were not given meaningful notice that their claims could be foreclosed as a result of an administrative action to which they were not even a party.

The Tenth Circuit opinion allows the large oil and gas companies such as Conoco to perpetuate a fraud at the Oklahoma Corporation Commission and then immunize themselves against claims by the landowners to whom they owe a fiduciary duty.

In Ruyle v. Conoco Oil Co., 44 F.3d 837 (10th Cir. 1994), cert. denied, ___ U.S. ___ (1995), the jury found that defendant had breached its duty to the lessors notwithstanding the fact that the Oklahoma Corporation Commission denied the application to epspace and respace the field. At trial, the Ruyle plaintiffs established that Conoco had two sets of data -- one for itself and one for the Commission. That is exactly what happened here. On appeal, the Tenth Circuit vacated the award and entered judgment for Conoco on the basis that the Commission order barred the litigation.

In Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1963), the Tenth Circuit held that where a tribunal has no power to adjudicate tort liability, it could not deprive a tort claimant of his day in court. Chief Judge Murrah stated:

> It is wholly inadmissible and incompatible with fundamental principles of due process to hold that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest.

320 F.2d at 162.

The Tenth Circuit here expressly disavowed this language. (Op. at 22-23, App. at 44-46.)

I. PLAINTIFFS WERE UNCONSTITUTIONALLY DEPRIVED OF THEIR CLAIMS WITHOUT BEING GIVEN ANY NOTICE THAT THEIR RIGHTS COULD BE EXTINGUISHED

In Goss v. Lopez, 419 U.S. 577 (1975) this court held that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every situation [citation omitted]." 419 U.S. at 578. The "timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the

competing interests involved." 419 U.S. at 579.

Notice includes a fair and adequate identification of the consequences of the proceeding. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Certain standards to afford due process have been incorporated into the civil procedure rules of the courts. Rule 4 requires service of a summons and complaint. The summons clearly sets forth that a default will be entered for the relief claimed in the complaint if a response is not made. The complaint must give notice of the claim being asserted. Fed. R. Civ. P. 8. Upon default, Fed. R. Civ. P. 54(c) precludes a plaintiff from obtaining a judgment in excess of the relief sought by the plaintiff in the ad damnum.

Plaintiffs could not assert their rights before the Commission because they did not receive proper notice of the

proceedings. They were not informed that the proceedings had to do with drainage issues. The only notices sent to the plaintiffs from the Commission regarding the proceedings before the Commission on their face did not inform plaintiffs of the purpose of the proceedings before the Commission.

The defendants never gave plaintiffs any notice that either would seek to use the proceedings before the Commission to preclude their day before a court that could provide plaintiffs redress for their private claims. Due process requires notice of defendants' intentions in the Oklahoma Corporation Commission or a finding that plaintiffs had been adequately represented. See Hansberry v. Lee, 311 U.S. 32 (1940).

Defendants contend that the Commission proceedings should have the same preclusive effect as proceedings before the district court. The notice requirements in district

court, however, are much more stringent and protect the interests of all parties. A summons is required to include statements to the effect that failure to appear in court will result in an ruling adverse to the party's interest and that he may consult an attorney prior to filing a response. Also, service upon parties in state and federal proceedings must be made by personal service or by certified mail restricted to the addressee. 12 O.S. § 2004; Fed. R. Civ. P. 4.

Under these circumstances, allowing the plaintiffs' private claims to be decided before the Commission without notifying plaintiffs that their claims would be barred and by not independently assessing the adequacy of representation violates due process.

II. PLAINTIFFS CANNOT CONSONANT WITH DUE PROCESS BE DEPRIVED OF THEIR CLAIMS BY A DECISION OF THE OKLAHOMA CORPORATION COMMISSION THAT DID NOT HAVE JURISDICTION OVER THEIR CLAIMS

As a result of a certification by the Tenth Circuit to the Oklahoma Supreme court, the Oklahoma Supreme Court delineated the differences between private and public disputes. The court stated:

> Title 52, O.S.Supp. 1988, § 87.1, defines the Commission's authority relative to a common source of supply and well spacing and drilling units. However, we have construed this statute to vest jurisdiction of public right disputes in the commission, whereas, disputes over private rights are properly brought in the district court.

Leck v. Continental Oil Co., 800 P.2d 224, 226 (Okl. 1989).

As to private disputes such as this, the Leck court held that the Commission does not have jurisdiction to adjudicate them:

> [W]hen the appellants applied for an order to restrict the allowable on the Wosika #1 well

> "in order to protect the correlative rights of all parties to the common source of supply," they properly brought the application before the commission. However, when a dispute arises between a lessor and a lessee regarding the lessee's breach of an implied covenant, the rights involved enter the realm of the private world and are proper disputes for the district court to resolve because they involve issues concerning the construction of a private contract between parties. Samson Resources v. Corporation Commission and TXO Production Corp., Okl. 742, P.2d 1114, 1116 (1987). Therefore, the appellants' action for damages for the lessee's alleged breach of an implied covenant to protect from drainage is a private action arising from their contract and does not involve the correlative rights of the "public".

800 P.2d at 226.

CONCLUSION

For the foregoing reasons,

Petitioners respectfully request that

their petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: January 3, 1996

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. Properties, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCARTNEY Family Trust as amended and restated April 17, 1986,	)	
Plaintiffs-Appellants,	)	94-6234
KIRKLAND ROYALTY, INC.,	)	94-6268
Additional Plaintiff-Appellant,	)	
v.	)	
CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D. Ct. No. CIV 93-574-C)

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Charles B. Davis, Oklahoma City, Oklahoma, filed a brief for amicus curiae Association of Land and Mineral Owners.

Before **EBEL**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **JENKINS**, Senior District Judge.

JENKINS, Senior District Judge.

The plaintiffs own mineral interests in certain property in Oklahoma. They brought this diversity action against

their lessees, Conoco, Inc., and C.I.G. Exploration, Inc. (CIGE), alleging that the lessees had failed to protect and develop their interests. The district court held that a prior decision of the Oklahoma Corporation Commission barred the plaintiffs' claims. We affirm.

I.

The plaintiffs own undivided interests in the oil and gas underlying section 14, Township 12 North, Range 16 West, Custer County, Oklahoma. Section 14 is a drilling and spacing unit for production of gas from the Des Moines common source of supply. Plaintiffs Ruth Fransen, Martha Harms, Elsie Hinz, Wilson Mahone, Mary Gene McCoy and Orman E. McCartney, Jr. and Rosaline O. McCartney, trustees under the McCartney Family Trust, leased their interests to Conoco. The other plaintiffs leased their interests to CIGE. Conoco operates the Meacham No. 1-

14 well, which is the unit well for section 14, and owns a 37 percent interest in its production. In early 1981, shortly after the Meacham No. 1-14 well was completed, Anson Corporation completed the Downing No. 1-15 well on adjoining section 15. Conoco owns a 29 percent interest in production from the Downing No. 1-15 sell; CIGE has no interest in the Downing No. 1-15 well.

The plaintiffs claim that the Downing No. 1-15 well is draining hydrocarbons from section 14. The plaintiffs brought this action claiming that the defendants breached their implied covenants under the leases to fully develop the leases, to protect them from drainage and to take whatever administrative or judicial action was necessary to protect section 14 from drainage. The plaintiffs claimed that the defendants breached their obligation to act as a prudent operator by failing to

drill an additional well in section 14. The plaintiffs also claimed that Conoco breached the fiduciary duty it owed the plaintiffs as operator for the section 14 unit. The plaintiffs claimed that Conoco's actions in fostering the completion of the Downing No. 1-15 well caused fraudulent drainage of section 14 and were tortious, wanton and malicious, subjecting Conoco to punitive as well as compensatory damages. Finally, the plaintiffs claimed that the defendants were liable for unpaid royalties. The plaintiffs sought cancellation of their leases and damages.

In 1992 the Oklahoma Corporation Commission (OCC) denied an application from Great Bear Exploration, Inc. to drill and additional well in section 14. The plaintiffs and defendants were notified of the OCC proceedings. Conoco opposed the application. None of the other parties

took part in the administrative proceedings. the OCC found that tan additional well in section 14 was unwarranted and would violate the rights of owners in other sections of the Des Moines common source of supply. Specifically, it found that the Meacham No. 1-14 well "has and will continue to recover for the owners in Section 14 their fair share of the gas in the Des Moines common source of supply." Aplee. Supp. App. at 44. The OCC found that Conoco had acted prudently in recovering a fair share of the gas in section 14 and resisting Great Bear's application. The OCC also found that "[a]ny drainage occurring in Section 14 is compensated for through production of the No. 1-14 Meacham well. To allow an additional well to be drilled and produced in Section 14 would result in damage to the correlative rights of owners in adjacent sections." Id. at 45. The

Oklahoma Court of Appeals affirmed the OCC order on appeal, and the Oklahoma Supreme Court denied certiorari. the OCC order is thus a final order.

Great Bear, the applicant before the OCC, assigned its interest in section 14 to Kirkland Royalty, Inc. the plaintiffs entered into agreements with Kirkland authorizing Kirkland to take any action on their behalf to protect their interests. Kirkland brought this action on behalf of the plaintiffs and is controlling and paying for this litigation.[1]

CIGE moved for partial summary judgment on the plaintiffs' claims for broach of their implied covenants to

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[1]Conoco filed a third-party complaint against Kirkland, claiming that Kirkland tortiously interfered with Conoco's relationship with its lessors and seeking to have the agreements between Kirkland and the plaintiffs invalidated. Kirkland was later realigned as an additional plaintiff. Conoco's claims against Kirkland have been stayed pending this appeal.

further develop section 14 and protect it against drainage. Conoco moved for partial summary judgment on all the plaintiffs' claims except their royalty underpayment claim. The district court granted both motions. The court concluded that, in light of the OCC's findings, the defendants' action did not broach any implied covenant. The court reasoned that the defendants could not be liable for failing to drill an additional well in section 14 when the OCC had determined that an additional wells should not be drilled. The court further held that Conoco was entitled to summary judgment on the plaintiffs' claim for breach of its fiduciary duty but concluded that, "[w]hether an award of punitive damages [against Conoco] is appropriate under any remaining theory cannot yet be determined." Aplt. App. at 278. The court also reserved the question of the

defendants' liability for royalty underpayments.[2] The court certified its partial summary judgments as final judgments under Federal Rule of Civil Procedure 54(b) and denied the plaintiffs' motion to reconsider its summary judgment rulings. The plaintiffs have appealed.

II.

This is not the first time we have considered clams by the owners of mineral interests in section 14 that Conoco failed to protect their interests. Other owners of mineral interests in section 14 brought an earlier action against Conoco's predecessor, Continental Oil, Co., alleging that offsetting wells were draining oil from section 14, that Conoco had failed to protect the section from drainage and that Conoco had not prudently

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[2]The parties later stipulated to a dismissal of the plaintiffs' royalty underpayment claims without prejudice.

developed the section. The case was tried to a jury, which found that Conoco had engaged in fraudulent drainage, had breached its fiduciary duty to the mineral interest owners and had failed to develop the mineral interests adequately. On appeal, this court held that the trial court erred in not giving preclusive effect to the OCC order and remanded the case with instructions to enter judgment against the plaintiffs in that action. See Ruyle v. Continental Oil Co., 44 F.3d 837 (10th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3834 (U.S. May 8, 1995) (No. 94-1841). Conoco and CIGE argue that the plaintiffs' claims in this action are similarly barred.

Ruyle held that the plaintiffs' claims there were barred on two -- under the doctrine of collateral estoppel (or issue preclusion) and under an Oklahoma statute prohibiting collateral attacks on

OCC orders. See 44 F.3d at 841. Under the doctrine of collateral estoppel, once a court decides an issue of law or fact that was fairly and fully litigated and necessary to its judgment, that issue may not be relitigated in a suit on a different cause of action. See Wilson v. Kane, 852 P.2d 717,722 n.23 (Okla. 1993); Veiser v. Armstrong, 688 P.2d 796, 800 nn. 9 & 11 (Okla. 1984). Collateral estoppel, however, only binds those who were parties to the first proceeding or their privies. Wilson, 852 P.2d at 722 n.23. None of the plaintiffs in this case, unlike the plaintiffs in Ruyle, took part in the OCC proceedings, although three of the plaintiffs -- Ruth Fransen, Martha Harms and Elsie Hinz -- entered into agreements with Great Bear, the applicant before the OCC, authorizing Great Bear to act on their behalf to have another well drilled

in section 14. See Alplee. Supp.App. at 245-65.

Ruyle suggests tat the plaintiffs may have been parties to the OCC proceedings under section 87.2 of title 52 of the Oklahoma Statutes, by virtue of their ownership of mineral interests in section 14. Section 87.2 provides that "mineral owners... within the subject area of an application or the owners of correlative rights within the common source of supply or supplies embraced within an application to the extent such owners are directly affected by such application, shall be proper parties" to protect the application or present testimony or evidence at a hearing thereon. Okla. Stat. Ann. tit 52 § 87.2A (West 1991). See also Ruyle, 44 F.3d at 844 ("Plaintiffs, as mineral owners on the lands covered by [Great Bear's} application, were thus statutorily designated as parties" to the OCC

proceedings.) It is not clear whether section 87.2 automatically makes a mineral owner a party to an OCC proceeding or merely designates who may be a party to OCC proceeding, in which case some further action would be necessary to make the potential party an actual party to the proceedings. Cf. Forest Oil Corp. v. Corporation Comm'n, 807 P.2d 774, 780 (Okla.) 1990) ("Section 87.2 enumerates those parties entitled to protest applications ... or to present evidence a hearings arising under or relating to those protests"). In any event, the plaintiffs in Ruyle moved to intervene in the OCC proceedings and actually appeared and took part in the proceedings through their attorney, whereas the plaintiffs here did not participate in the OCC proceedings. Thus, Ruyle is distinguishable.

The plaintiffs advance other arguments, not expressly considered in Ruyle, why collateral estoppel should not apply in this case.[3] We need not reach those arguments, however, because we conclude that whatever preclusive effect the OCC order has in this action is the

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[3] Specifically, the plaintiffs claim that collateral estoppel should not apply here because the notice of the OCC proceedings was deficient in that it did not indicate that drainage was in issue before the OCC, because Conoco's alleged misconduct in misleading the OCC precludes it from relying on collateral estoppel, because the plaintiffs could not have foreseen that the OCC findings could have preclusive effect and because the following differences between the OCC proceedings and this action making the application of collateral estoppel here unfair: the plaintiffs have a right to a jury trial in this action, whereas there was no such right before the OCC; different standards of proof applied in the OCC proceedings than apply in this case; the OCC proceedings were for nonmonetary relief, whereas the plaintiffs here seek substantial money damages; OCC procedures were less extensive than trial court procedures; and the OCC proceedings involved public rights, not private rights, such as those involved in this action. Ruyle expressly considered (and rejected) only this last argument. See 44.F.3d at 844-5.

same whether considered under the doctrine of collateral estoppel or under Oklahoma's statutory probation against collateral attacks on OCC orders. See Okla. Stat. Ann. tit. 52 § 111.

Although related, the rule against collateral attacks and the common law doctrine of collateral estoppel or issue preclusion are not the same. The collateral attack doctrine ca apply even where collateral estoppel does not. See Trahan v. Superior Oil Co., 700 F.2d 1004, 1019 (5th Cir. 1983). In particular, a person can be barred from collaterally attacking an order entered in a proceeding to which eh or she was not a party. See, e.g., Frost v. Gulf Oil Corp.,482 P. 2d 607, 610-11 (Okla. 1971). Because the prohibition against collateral attacks applies to all the plaintiffs -- even those who were not in privity with Great Bear (a party to the OCC proceedings)--we

will analyze the plaintiffs' claims under Oklahoma's statutory proscription against collateral attacks rather than under the doctrine of collateral estoppel.

Section 111 of title 52 of the Oklahoma Statutes provides:

> No collateral attack shall be allowed upon orders, rules and regulations of the [Oklahoma Corporation] Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the [Oklahoma] Supreme Court.

Okla. Stat. Ann. tit. 52, §111. "A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial." Woods Petroleum Corp. v. Sledge, 632 P.2d 393, 396 n.4 (Okla. 1981). We believe the plaintiffs'

claims would avoid, defeat or deny the force and effect of the OCC's order in this case and thus are barred as a collateral attack on that order.

Under Oklahoma law, an oil or gas lessee owes its lessor certain duties, including a duty to further develop a lease after an initial well has been drilled and to protect the lease from draining. See Trust Co. v. Samedan Oil Corp., 192 F.2d 282, 284 (10th Cir. 1951) (applying Oklahoma law); Samson Resources Co. v. Corporation Comm'n, 702 P.2d 19, 23 (Okla. 1985). These duties are inherent in the lessee's implied covenant to develop the lease as a prudent operator. See Leck v. Continental Oil Co. 800 P.2d 224, 228 (Okla. 1989). Similarly, a unit operator, such as Conoco, has a duty to operate the lease holds as a unit and to safeguard the correlative rights of the various interest holders. Samson, 702

P.2d at 23. The unit operator's duty is fiduciary in nature. See Leck, 800 at 228-29.

Although the implied covenant to fully develop a lease and the implied covenant to protect against drainage are separate covenants, see Rogers v. Heston Oil Co., 735 P.2d 542, 546 (Okla. 1984), to recover for a breach of either covenant, the plaintiffs must show that a prudent operator, having due regard for the interests of both the lessor and lessee, would have drilled an additional, offset well on section 14. See Gerson v. Anderson-Prichard Prod. Corp, 149 F.2d 444, 446 (10th Cir. 1945); Rogers, 735 P.2d at 546-47; Haken v. Harper Oil Co., 600 P.2d 1227, 1230-31 (Okla. Ct. App. 1979). To prevail on their breach of fiduciary duty claim, the plaintiffs must prove that Conoco engaged in improper operations on section 14. See Leck v.

Continental Oil Co., 971 F.2d 604, 607 (10th Cir. 1992); Leck, 800 P.2d at 229.

Under Oklahoma law, only one well is permitted in a spacing or drilling unit, such as section 14, unless the OCC authorizes an additional well. See Okla. Stat. Ann. tit. 52, §87.1(d) & (e), and the OCC specifically denied permission to drill a second well in section 14. A prudent operator would not drill a well that was prohibited by law. The plaintiffs therefore could not establish an essential element of their claims for breach of the implied covenants of development and protection without avoiding, evading and denying the effect of the OCC order.

Moreover, Oklahoma recognizes that the express provisions of an oil or gas lease may negate or modify the lessee's implied covenants. See Rogers, 735 P.2d at 546. The leases in this case provided

that all express and implied covenants were subject to federal and state laws, executive orders, rules and regulations and excused Conoco and CIGE from liability for failure to comply with any covenant if compliance was prevented by (or the failure to comply was the result of) any such governmental action. The OCC order denying permission to drill a second well in section 14 prevented compliance with any duty the defendants might otherwise have had to drill an offset well in section 14 and therefore excused the defendants' failure to drill such a well. See Cook v. El Paso Natural Gas Co., 560 F.2d 978, 982 (10th Cir. 1977) (where government action precludes the drilling of a second well, an express or implied contractual covenant to drill such a well is excused) (applying New Mexico law); Sinclair Oil & Gas Co. v. Bishop, 441 P.2d 436, 446-47 (Okla. 1967) ("the obligor

under a contract is not compelled to perform under the contract terms when to do so would be contrary to law").

In short, the trial court correctly concluded that Conoco and CIGE did not breach any duty to the plaintiffs by not drilling a well they could not lawfully drill.

The plaintiffs argue the Conoco breached its independent duty as unit operator to seek OCC approval for an additional well and therefore can be liable despite the OCC order. The fact that the application the OCC denied was from Great Bear and not the defendants is irrelevant. Neither the plaintiffs nor the defendants were free to ignore the effect of the OCC order. Under Oklahoma law, the OCC could authorize an additional well only if it would help prevent waste or protect the correlative rights of those interested in the common source of

supply.[4] See Okla. Stat. Ann. tit. 52, §87.1(d). The OCC expressly found that a second well on section 14 was not justified and that to allow an additional well to be drilled and produced would damage the correlative rights of owners in adjacent sections. That finding was not

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[4]Oklahoma law defines "waste" as applied to gas to include the production of gas in such quantities as unreasonably to diminish the quantity of oil or gas that can be recovered from a common source of supply and the unnecessary depletion or inefficient use of gas contained in a common source of supply. See Okla. Stat. Ann. tit. 52 §86.3 (1991). See also id. §237. "Waste" includes a "loss of ultimate recovery" of minerals and "can consist of unreasonable production or unreasonable non-production." Kuykendall v. Corporation Comm'n 634 P.2d 711, 716 (Okla. 1981) (citations omitted). It also includes those factors that affect "the practicable recoverability of minerals" from land. Id. at 717.

The Oklahoma Supreme Court has defined "correlative rights" to include "the relative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners (1) not to injure the common source of supply and (2) not to take an undue proportion of the oil and gas." Kingwood Oil Co. v. Hall-Jones Oil Corp., 396 P.2d 510, 512 (Okla. 1964).

subject to collateral attack, see §111, even by the OCC itself, see Kaneb Prod. Co. v. GHK Exploration Co., 769 P.2d 1388, 1391 (Okla. 1989). Thus, even if Conoco or CIGE had submitted its own application to drill a second well on section 14, the OCC would have had to deny the application, absent a substantial change in conditions or in knowledge of conditions. See Anson Corp. v. Hill, 841 P.2d 583, 586 (Okla. 1992); Nilsen v. Ports of Call Oil Co., 711 P.2d 98, 102 (Okla. 1985); Phillips Petroleum, 482 P.2d at 609-11.

The plaintiffs suggest that there was a sufficient change in conditions or in knowledge of conditions to justify a different result had Conoco or CIGE sought permission to drill a second well. Specifically, the plaintiffs claim that Conoco presented false data to the OCC in

opposing Great Bear's application.[5] They claim that Conoco had one set of date that it used internally in making its business judgments and another set of data that it showed the OCC in opposing Great Bear's application and on which the OCC ultimately relied. The plaintiffs suggest that, if Conoco had given the OCC the more accurate data, which it withheld, the OCC would have granted permission to drill a second well.

The plaintiff's argument is essentially that Conoco committed a fraud

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[5]The plaintiffs claim that the fact that the OCC permitted three wells to be drilled on an adjoining section (section 23) was also a material change in condition. The plaintiffs have not shown how that fact changes any of the facts the OCC relied on in making its decision, and the OCC's order allowing additional wells in section 23 was entered before the OCC's order denying an additional well in section 14 and thus was not a material change in conditions. See Aplt. App. at 84-86; Aplee. Supp. App. at 43-45. In any event, any argument about changed conditions is properly addressed to the OCC, not the court.

on the OCC. A claim that a party misrepresented facts to the OCC is properly brought before the OCC. Leck, 800 P.2d at 230. The district court lacked jurisdiction to consider such a claim of intrinsic fraud. Id at 229-30.

The plaintiffs argue that, even if the OCC order precluded the defendants from drilling a second well on section 14, the defendants could have taken other steps to prevent or lessen the effect that the section 15 well had on section 14 and that they breached their duty to act as prudent operators by failing to do so. Cf. Cook, 560 F.2d at 982 (a lessee who is excused from drilling a second well is not necessarily excused from seeking alternative remedies to protect against drainage).

Oklahoma law recognizes that a lessee may have an implied obligation to seek appropriate administrative action where

necessary to protect the lessor's interests. See Spaeth v. Union Oil Co., 710 F.2d 1455, 1458 (10th Cir. 1983) (applying Oklahoma law); Sinclair, 441 P.2d at 447. But see Sunray DX Oil Co. v. crews, 448 P.2d 840, 844-45 (Okla. 1968) (stating that the Oklahoma Supreme Court had never recognized an implied covenant requiring a lessee to appear in a proceeding before a regulatory agency to obtain orders favorable to the lessor and declining to reach the question of the validity of such an implied covenant under the facts of that case).

In Sinclair, lessors sued their lessees for failure to prudently develop, operate and produce the lease. The lessors claimed that the lessees should have produced a well drilled on their property. The court agreed that the lessees had acted prudently in not producing the well because to produce the

well as an oil well, as the lessors urged, would have resulted in a substantial waste of both oil and gas. However, other wells in the same reservoir were being produced, also at a substantial loss of oil and gas, and their production wa draining the lessors' lease. The court held that, even though the lessees had properly refused to produce a well on the leased premises, they could still be liable in damages for failing to ask the OCC to stop the other wells in the area from producing oil in a way that wasted great quantities of gas and incidentally drained the lessors' property. 441 P.2d at 447.

Similarly, the plaintiffs here claim that, regardless of whether the defendants acted properly in not drilling another well on section 14, the defendants had duty to take other steps to prevent the well on section 15 from draining section 14. Specifically, the plaintiffs claim

the defendants should have asked the OCC either to lower production in the draining well or to require payment of a compensatory royalty on the excess production from the draining well.

Neither the OCC nor the district court expressly considered alternative measures to protect section 14 from drainage.[6] If a claim does not challenge the OCC's findings or conclusions, it is not barred as a collateral attack on an OCC order. See Greyhound Leasing & Fin. Corp. v. Joiner City Unit, 444 F. 2d 439, 445 (10th Cir. 1971) (an action that did not directly or indirectly challenge an

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Although the district court did not expressly rule on the plaintiffs' claim for breach of an implied covenant to seek favorable administrative action, its ruling on Conoco's motion for partial summary judgment implicitly denied the claim. Conoco's motion for partial summary judgment asked for judgment on all of the plaintiffs' claims except the royalty underpayment claims, and the district court granted Conoco's motion except as to punitive damages.

OCC order or otherwise draw it in issue was not a collateral attach on the order); Samson Resources Co. v. Corporation Comm'n, 702 P.2d 19, 23 (Okla. 1985) (where a dispute over who should be the unit operator did not concern the disproportionate taking of gas from a common source of supply and thus did not involve correlative rights, the dispute was beyond the OCC'S jurisdiction, and the district court could properly entertain the claim).

Although the OCC's order does not address these alternative forms of relief, we believe the plaintiff's claim nevertheless constitutes an impermissible collateral attack on the OCC order since it would require the OCC to reverse its findings supporting the order.

The OCC can adjust allowable levels of production from wells in a common source of supply, see Okla. Stat. Ann.

tit. 52, § 87.1 (a) & (c); Samson Resources, 702 P.2d at 22, 23, or impose a penalty on future allowables from an offsetting well, see GMC Oil & Gas Co. v. Texas Oil & Gas Corp., 586 P.2d 731, 733-34 (Okla. 1978): Halpin V. Corporation Comm'n, 575 P.2d 109, 112 (Okla. 1977). However, it can only do so where necessary to prevent waste or protect Correlative rights. See Okla. Stat. Ann. tit. 52 § 87.1. Before the OCC could reduce the allowable for the section 15 well or otherwise penalize it, it had to find that the section 15
well was causing uncompensated drainage. See Ason Corp., at 588. The OCC did not expressly determine whether section 15 was draining section 14, but it did determine that whatever drainage section 14 was suffering was not uncompensated. That finding was necessary to the OCC's conclusion that another well should not be

drilled in section 14 and was therefore not subject to collateral attack. The OCC could not have granted the relief the plaintiffs claim the defendants should have sought without effectively overturning its factual findings that section 14 was not suffering uncompensated drainage but was receiving its fair share of gas from the common source of supply. Because the defendants could not have obtained the relief the plaintiffs claim they should have sought without collaterally attacking the OCC order, the defendants cannot be liable for not seeking such relief.[7]

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[7] At oral argument, counsel for the plaintiffs suggested that, in addition to asking the OCC to reduce the allowable for the section 15 well or otherwise penalize its production, the defendants should have asked to OCC to increase the allowable for the Meacham no. 1-14 well. Such a claim is also barred a collateral attack on the OCC order, since the OCC determined that the Meacham No. 1-14 well was already recovering for the owners in section 14 their fair share of the gas in the Des Moines common

The plaintiffs concede that the OCC resolved the factual issue of whether section 14 was suffering uncompensated drainage. See Corrected Br. of Aplts. at 7. the plaintiffs suggest, however, that the standard for determining the defendants' liability is not whether section 14 was suffering uncompensated drainage but whether section 14 was suffering drainage at all.

They claim that a prudent operator would have take steps to prevent drainage from section 14, even if section 14 was not suffering any net drainage. As the plaintiffs point out, the OCC did not find that section 15 was not draining section 14--only that whatever drainage section 14 was experiencing was compensated for by production from the Meacham No. 1-14 well,

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source of supply and thus would not be entitled to any greater production.

which was apparently draining hydrocarbons from other sections.

The plaintiffs cite no cases to support their argument that compensated drainage is sufficient to impose liability on a lessee. Instead, they rely on two treatises. See 5 Howard R. Williams & Charles J. Meyers, Oil and Gas Law §§ 822.3 & 822.4 (1995); 5 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 61.3 at 175 (1991).[8] Professors Williams and

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[8] The only authority Professors Williams, Meyers and Kuntz cite for their position -- Pan American Petroleum Corporation v. Hardy, 370 S.W. 2d 904 (Tex. Civ. App. 1963) -- is distinguishable because it involved separate reservoirs. The lessor in Pan American was damaged by drainage from one reservoir but benefitted from drainage into a different reservoir. The court held that the implied covenant of protection applied to each reservoir separately, so the lessor could seek damages for drainage from reservoir A even though reservoir B had actually gained minerals. See 370 S.W.2d at 908. Because Pan American viewed each reservoir separately, it only supports recovery for uncompensated drainage. Other cases have suggested that a lessor who suffers no net loss from drainage has no claim for breach of the lessee's implied

Meyers explain the rational for this position as follows: Under the rule of capture, a landowner has a right to drill for and recover all the minerals underlying his land. If oil and gas underlying his property migrate to a neighboring tract, the landowner has lost the right to reduce those particular minerals to possession and has been injured to that extent, "regardless of how much oil or gas has migrated to the leasehold." See 5 Williams & Meyers, supra, § 822.3 at 97-98. A prudent operator, they conclude, would take steps to prevent such drainage, even if it was

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covenants. See Carter Oil Co. v. Dees, 92 N.E.2d 519, 524 (Ill.App. Ct. 1950); Central Ky. Natural Gas Co. v. Williams, 60 S.W. 2d 580, 583, 584 (Ky. 1933); Louisiana Gas Lands, Inc. v. Burrow, 1 So..2d 518, 521 (La. 1941); Continental Oil Co. v. Blair, 397 So.2d 538, 540, 543 (Miss. 1981); Olson Petroleum Co., 297 S.W.2d 885, 887 (Tex. Civ. App. 1956).

suffering no new loss. See id. § 822.4 at 102.

The plaintiffs have cited no Oklahoma cases on point, but in an analogous situation--where the lessor owns an interest in both the drained tract and the draining tract--Oklahoma allows the lessor to recover only his net loss, that is, the amount lost from the drained tract less the amount received from the draining tract as a result of the drainage, suggesting that a lessor is entitled to recover only for uncompensated drainage. See Feely v. Davis, 784 P.2d 1066, 1068-69 (Okla. 1989); Indian Territory Illuminating Oil Co. v. Rosamond, 120 p.2d 349, 355-56 (Okla. 1941).[9]

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[9] Professor Kuntz suggests that the analogy to such cases is a false one, since a prudent operator would still drill a protection well if by doing so he could profitably recover more oil and gas, regardless of whether the drainage he was suffering was compensated. See 5 Kuntz, supra, §61.3 at 175. In Oklahoma, however,

We need not decide whether Oklahoma would recognize as an abstract proposition that a party who has suffered drainage has been injured, regardless of whether the drainage has been compensated for by other drainage. Everything the plaintiffs claim the defendants her should have done required the approval of the OCC. The OCC is required to consider the correlative rights of other interest holders in the common source of supply. See Okla. Stat. Ann. tit, 52, § 87.1. Where the state, through the OCC, undertakes to protect the correlative rights of owners in a common source of supply, the law of capture--the theoretical underpinning for the plaintiffs' proposed rule--does not apply. See Palmer Oil Co. v. Phillips Petroleum

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in a situation like this the prudent operator needs the OCC's permission to drill a second well, and the OCC denied permission to drill a second well on section 14 where section 14 was suffering no uncompensated drainage.

Co., 231 P.2d 997,1012 (Okla. 1951), appeal dismissed, 343 U.S. 390 (1952). Where, as here, the OCC has established spacing and drilling units for a common source of supply, a lessee or operator is not free to take more than its fair share of oil and gas. "All parties are prohibited from taking an unproportionate amount." GMC, 586 P.2d at 733 (emphasis in original). Regardless of whether section 15 is draining section 14, the OCC expressly found that owners in section 14 were and would continue to receive their fair share of gas. [W]hen, as here, the judicial relief sought depends entirely upon the adjustment ad protection of correlative rights already ruled on by the [OCC], the court is not a liberty to make such a[n] award if the [OCC] has concluded that no correlative rights have been violated." Ruyle, 44 F.3d at 845. The OCC determined that the owners in section 14

were already receiving their fair share of gas from the common source of supply and that Conoco had acted as a prudent operator. The defendants could not be liable for failing to obtain for the plaintiffs more than their fair share of gas where, as here, they needed OCC approval and the OCC could not have authorized them to take more than their fair share.

Our conclusion that the plaintiffs' claims are barred as a collateral attack on the OCC order is consistent with Oklahoma case law. In Woods Petroleum Corporation v. Sledge, 632 P.2d 393 (Okla. 1981), a well operator brought a quiet title action to determine the right of mineral owners to participate in the drilling of three additional wells. The OCC had granted the operator permission to drill the additional wells, conditioned on its commencement of drilling within 120

days. The operator did not begin drilling within 120 days, and the OCC order lapsed. The court noted that, in determining whether and under what conditions the operator could drill additional wells, the OCC had necessarily adjusted the equities among the parties, and the operator had not appealed the OCC's order. The court concluded that the operator's quiet title action was an effort to establish rights that the OCC had already considered and adjusted. As such, it was "an unpermitted collateral attach" on the OCC order, and the district court therefore lacked jurisdiction to entertain the action. See 632 P.2d at 396. See also Pelican Prod. Corp. v. Wishbone oil & Gas, Inc., 746 P. 2d 209, 211-12 (Okla. Ct. App. 1987) (the district court lacked subject matter jurisdiction over an action seeking damages for conversion of hydrocarbons from one formation where the OCC had

determined that the defendant's wells were producing from other formations; the OCC had sole authority to determine from which formation the defendant's wells were producing, and the court could not make the determination in the face of an OCC order to the contrary).[10] Similarly,

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Citing Oklahoma Rule of Appellate Procedure 1.200. C.B, the plaintiffs claim that Pelican Production is not precedent under Oklahoma law. the rule is not entirely clear on the precedential value of Oklahoma Court of Appeals' opinions. See Okla. R.App.P. 1.200(C)(B), Okla. Stat. Ann. tit. 12, ch. 15, app. 2(Supp. 1995). Of course, in determining Oklahoma law we are not bound by decisions of lower state courts. See Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967); King v. Order of United Commercial Travelers, 333 U.S. 153, 160-61 (1948). We must determine issues of state law as we believe the highest court in the state would determine them. Diatom Inc. v. Pennwalt Corp., 741 R.2d 1569, 1574 (10th Cir. 1984). However, decision of a state's intermediate appellate courts are some evidence of how the state supreme court would decide the issue, and we can consider them s such, even if they are not binding precedent under state law. See West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940); Perlmutter v. United States Gypsum Co., 4 F.3d 864, 869 n.2 (10th Cir. 1993); Romero v. International Harvester Co., 979 F.2d 1444, 1449 n.3 (10th Cir.

here the OCC considered and adjusted the correlative rights of owners in the Des Moines common source of supply when it found that an additional well should not be drilled in section 14, and the district court could not entertain an action that collaterally attacked the OCC's findings.

III.

The plaintiffs and amicus argue that this court's decision in Tidewater Oil Company v. Jackson, 320 F. 2d 157 (10th Cir.), cert. denied, 375 U.S. 942 (1963), precludes the court from giving the OCC order any preclusive effect. In Tidewater, we held that an order of the Kansas Corporation Commission authorizing Tidewater to flood its properties did not insulate Tidewater from liability to adjoining leaseholders whose property was damaged as a result. We recognized that

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1992).

"[t]he determinations of the Kansas Corporation Commission, of matter within its competence, is undoubtedly binding here, insofar as applicable to this asserted claim." 320 F.2d at 161. But the Kansas Corporation Commission did not consider Tidewater's liability for is flooding operations. In fact, it specifically recognized that the owners of producing wells might well have an action for damages for the flooding of their wells but that the commission did not have jurisdiction over such a claim. See id. at 160. The court held that "the issue of tort liability for the acts done and performed by Tidewater, in the exercise of its right granted by Commission to water flood its properties, survives the determinations of the commission." id. at 162.

Tidewater is easily distinguished. Tidewater rested on the principle that a

party who does a lawful act can still be liable for any damage he causes. See id. at 161-62. See also Greyhound Leasing & Fin. Corp. v. Joiner City Unit, 444 F. 2d 439, 442 (10th Cir. 1971) (a legalized use of property can still be a nuisance) (applying Oklahoma law); Snyder Ranches, Inc. v. Oil conservation Comm'n, 798 P.2d 587, 590 (N.M. 1990) (a license to inject salt water into a disposal well does not authorize trespass or other tortious conduct by the licensee or immunize the licensee from liability for harm flowing from the licensed activity). The plaintiff in Tidewater did not challenge the corporation commission's order granting the defendant permission to flood his property, nor was the plaintiff's claim inherently inconsistent with the commission's finding that flooding of the property was warranted. Instead, the plaintiff simply sought to hold the

defendant liable for damages caused by his lawful act. Here, on the other hand, the plaintiffs are trying to hold the defendants liable for not doing something the OCC prohibited them from doing. One cannot incur liability by refusing to do something contrary to law. See Sinclair Oil & Gas Co. v. Bishop, 441 p.2d 436, 445-47 (Okla. 1967). The defendants could not have drilled a second well with out ignoring the OCC order and violating Oklahoma law. Thus, the plaintiffs' claims here directly challenge the OCC order.

The court in Tidewater based its decision on the principle that "the fact that an act is lawfully undertaken and lawfully done does not, ipso facto, relieve the actor of liability for the harmful consequences of his act." 320 F. 2d at 161-62. Nevertheless, the court went on to say, in dicta,

> It is wholly inadmissible and incompatible with fundamental principles of due process to hold that a tribunal, possessing no power to adjudge tort liability, may nevertheless deprive a tort claimant of his day in court on that issue, by conclusive adjudication of the operative facts upon which his claim must rest.

Id. at 162. We believe this last statement goes too far. It is now well settled that facts found administratively can have a preclusive effect in later legal proceedings. See, e.g., United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966); Long v. Laramie County Community College Dist., 840 F.2d 743, 750-52 (10th Cir.), cert. denied, 488 U.S. 825 (1988); Bowen v. United States, 570 F.2d 1311, 1320-23 (7th Cir. 1978); Bostwick v. Atlas Iron Masters, Inc., 780 P. 2d 1184, 1187 (Okla. Ct. App. 1988). In fact, Oklahoma has given preclusive effect to OCC orders. See, e.g., Leede Oil & Gas, Inc. v. Corporation Comm'n, 747

P.2d 294, 298-99 (Okla. 1987). To the extent Tidewater suggests that ultimate facts found in administrative proceedings can never be binding in a subsequent tort action, we disavow its dicta.[11]

IV.

On a collateral attack, such as this, the district court had no jurisdiction to inquire into the facts determined in the OCC proceedings. It could only determine from the face of the proceedings whether the OCC had jurisdiction to issue the

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Tidewater itself gave preclusive effect to the Kansas Corporation Commission's order on the issue of punitive damages. The court noted that, under Kansas law, a party seeking punitive damages must show that the defendant's acts constituted a "gross" neglect of duty" showing "a reckless indifference of the rights of others." 320 F.2d at 165 (citations omitted). The court concluded that the commission's order made the defendant's actions lawful, precluding an award of punitive damages. See id.

order.[12] See, e.g., SKZ, Inc. v. Petty, 782 P.2d 939, 943 (Okla. 1989); Harry R. Carlile Trust, 732 P.2d at 441; State v. Corporation Comm'n, 590 P.2d 674, 677 (Okla. 1979). The plaintiffs have not directly attacked the OCC's jurisdiction on appeal,[13] and the OCC clearly had

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The "face of the proceedings" means the application, the process by which the parties were notified and the OCC's order. See Harry R. Carlile Trust v. Cotton Petroleum Corp., 732 P.2d 438, 441 & n.8 (Okla. 1986), cert. denied, 483 U.S. 1007, 1021 (1987); Mullins v. Ward, 712 P.2d 55, 59 n.7 (Okla. 1985).

The plaintiffs only claim that the OCC had no jurisdiction to consider claims involving private rights and that its order should therefore not have any preclusive effect in a case such as this, which is seeking redress for violations of private rights. This court rejected the argument in Ruyle. See 44 F.3d at 844-45. the fact that the OCC lacked jurisdiction to consider the plaintiffs' claims in this case is irrelevant. Those claims were never brought before the OCC. The only question here is whether the OCC's finding on the matters before it bars the plaintiffs' claims in this action. That depends on whether the OCC was acting within its jurisdiction when it made its findings and whether those findings were essential to its order. We

subject matter jurisdiction over Great Bear's application to drill a second well on section 14. See Okla. Stat. Ann. Tit. 52, § 87.1 (a).

In the trial court, the plaintiff claimed that the OCC order was void because plaintiff Tim Ruyle was not mailed notice of the OCC proceedings.[14] If Mr.

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answer both questions in the affirmative.

On appeal, the plaintiffs raise the adequacy of the notice of the OCC proceedings only as a factual issue they claim precluded summary judgment and as an additional reason why collateral estoppel should not apply. See Corrected Br. of Aplts. at 9 & 26. The plaintiffs claim the notice of the OCC proceedings was defective because it did not say that drainage would be an issue. They cite no authority for the proposition that an OCC order can be collaterally attacked if the notice of the proceedings does not specify every issue the OCC might consider in the proceedings. The notice here indicated that Great Bear sought authority to drill an additional well in section 14. The OCC could only authorize another well in section 14 to prevent waste or to protect correlative rights. See Okla. Stat. Ann. tit 52 §87.1(a). Drainage is perhaps the most common factor affecting correlative rights. Cf. Leck v. Continental Oil Co., 971 F.2d 604, 606 (10th Cir. 1992)

Ruyle was not given proper notice of the OCC proceedings, the OCC's jurisdiction would have been defective at least as to him. See Anson Corp. v. Hill, 841 P.2d 583, 586-87 (Okla. 1992) It appears that Mr. Ruyle may not have received personal notice of the initial application and hearing. Aplee. Supp. App. at 52-74. However, notice was also published, see id. at 61-67, and, before the administrative law judge concluded the hearings and issued her initial report, Great Bear amended its application so that it could give notice to those interest owners who had been overlooked in the initial mailing. See id. at 122, ¶20. A copy of the amended application and notice of hearing was mailed to Timothy J. Ruyle

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("Drainage and correlative rights are, of course, directly related"). We believe the plaintiffs were sufficiently apprised of the fact that drainage could be an issue in the OCC proceedings.

on March 6, 1991, before the hearings on Great Bear's application were concluded. See id. at 104-10. The plaintiffs have not met their burden of showing that the OCC lacked jurisdiction to issue its order. Cf. Forest oil Corp. v. Corporation Comm'n, 807 P.2d 774, 783-84 (Okla. 1990) (notice of OCC proceedings mailed to all parties listed in the applicant's records was adequate, even though the records contained no address for four identified interest owners, where notice was also published after the first day of hearing on the merits but before the hearings were concluded).

V.

Our conclusion that the OCC order barred the plaintiffs' claims for breach of the defendants' implied covenants does not mean that the plaintiffs are without any remedy. It simply means that they are in the wrong forum. If, as they suggest,

Conoco misrepresented facts to the OCC or if conditions or knowledge of conditions have changed since e the OCC found that the Meacham No. 1-14 well was recovering for the owners in section 14 their fair share of the gas in the Des Moines Common source of supply, then the plaintiff can ask the OCC to repeal, amend or modify its prior order.[15] It does not appear that the plaintiffs have made such a showing before the OCC. Until they do, the OCC's Order bars the plaintiff' claims for

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The plaintiffs argue that they should not have to seek relief from the OCC before they can pursue private remedies in district court. We do not hold that a lessor must seek relief from the OCC before bringing an action for breach of a lease obligation. We simply hold that, where the OCC has already considered and made findings on underlying facts relevant to the lessor's claims, neither the lessor nor the court can ignore the OCC's ruling. A plaintiff need not go to the OCC before bringing an action, but where an OCC order stands as a bar to his claims in district court, the plaintiff must first ask the OCC -- not the district court -- to remove the bar.

breach of implied covenants and breach of fiduciary duty.[16]

The district court properly granted the defendants' motions for partial summary judgment. Accordingly, we AFFIRM the district court's orders and remand this action for further proceedings consistent with this opinion.

Citing an advisory report of an OCC task force, the plaintiffs suggest that the OCC itself does not believe its orders should have preclusive effect in private civil disputes. Of course, the Oklahoma legislature is free to change the statute barring collateral attacks on OCC orders, but until it does we are required to apply the stature. The plaintiffs' arguments for changing the statute are properly addressed to the legislature.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. Properties, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	)	
Plaintiffs-Appellants,	)	Nos. 94-6234
v.	)	94-6268
CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,	)	
Defendants-Appellees.	)	

ORDER
Entered October 5, 1995

Before EBEL and McWILLIAMS, Circuit Judges, and JENKINS*, District Judge.

*The Honorable Bruce S. Jenkins of the United States District Court for the District of Utah, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and motion for certification of question to the Oklahoma Supreme Court, and appellees' response to the motion for certification.

Upon consideration whereof, the petition for rehearing and the motion for certification of question to the Oklahoma Supreme Court are denied.

Entered for the Court

PATRICK FISHER, Clerk

By Opal A. Carter
Deputy Clerk

Supreme Court, U.S.
FILED

951133 JAN - 3 1996

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. Properties, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated

Petitioners,

v.

CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,

Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	)
Plaintiffs	)
vs.	) Case No. CIV-93-574-C
CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,	)
Defendants	)
vs.	)
KIRKLAND ROYALTY, INC.,	)
Third Party Defendant, and Additional Defendant to Counterclaims	)

Filed April 14, 1994

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the Court for consideration of defendant Conoco Inc.'s ("Conoco") motion for partial summary judgment on the claims made by plaintiffs. Plaintiffs allege Conoco breached an implied covenant to further develop their mineral interests and that Conoco failed to protect the plaintiffs' mineral interests from drainage. On March 9, 1994, plaintiffs responded to Conoco's motion. On March 24, 1994, Conoco filed a reply. Certain facts were established in connection with a similar motion for summary judgment filed by C.I.G. Exploration, Inc. ("CIGE") as to plaintiffs' claims. Conoco adopts ¶¶ 1,2, 5, 8 and 9-12 of CIGE's statement of undisputed facts. Conoco's Brief at 2 (Feb. 22, 1994). Plaintiffs also adopt their objections to those facts. Plaintiffs' Brief at 1 (March 9, 1994). The Court adopts the undisputed facts announced in its decision of today's date regarding CIGE's

motion for summary judgment. The following additional facts have been established in the pleadings associated with Conoco's motion. The facts the Court finds pertinent to Conoco's motion are listed below. Except where noted, the facts are not in dispute.

1. Ruth Fransen, Martha Harms, Elsie Hinz, Wilson Mahone, Mary Gene McCoy, and Orman E. McCartney, Jr. and Rosaline Q. McCartney, Trustees under the McCartney Family Trust are lessors of Conoco ("Conoco Lessors"). Tim Ruyle, Jeanette Stone, Cassandra Gibbons, and Del Gordon d/b/a G.M. Properties are lessors of C.I.G. Exploration, Inc. ("CIGE Lessors"). **Source**: Plaintiffs' Complaint, ¶¶ 10, 11, 12.

2. Conoco Inc. is the operator of the Meacham No. 1-14 Well and owns an interest in its production. **Source**: Scheduling Conference Memorandum at Stipulated Facts, paragraph III.F, Ex. A to Conoco's motion, ¶ 4; and Complaint at ¶ 19.

3. The Downing No. 1-15 Well is located in Section 15 and was completed in the Red Fork member of the Des Moines common source of supply in April 1981. **Source**: Affidavit of Julie Vap attached as Ex. A to Conoco's motion, ¶ 4.

4. Anson Corporation is the operator of the Downing No. 1-15 Well. **Source**: Affidavit of Julie Vap attached as Ex. A to Conoco's motion, ¶ 4.

5. Conoco owns an interest in production from the Downing No. 1-15 Well. **Source**: Affidavit of Julie Vap attached as Ex. A to Conoco's motion, ¶ 4.

6. Plaintiffs claim CIGE and Conoco breached the impled covenants of their oil and gas leases by failing to develop their leases and by failing to drill an additional well to protect Section 14 from the drainage allegedly caused by the Downing No. 1-15 Well. **Source**: Complaint; Section I of the

Scheduling Conference Memorandum/Status Report.

7. Plaintiffs claim because Conoco is the operator of the Meacham No. 1-14 Well in Section 14, Conoco owes plaintiffs a fiduciary duty and is in breach of that fiduciary duty by failing to develop Section 14 and to protect Section 14 from drainage. **Source**: Complaint; Section I of the Scheduling Conference Memorandum/Status Report.

8. Because Conoco owns an interest in the Downing No. 1-15 Well, the well they believe is responsible for drainage to Section 14, plaintiffs claim Conoco is engaging in fraudulent drainage for which plaintiffs seek punitive damages and cancellation of their leases. **Source**: Complaint; Section I of the Scheduling Conference Memorandum/Status Report.

9. The oil and gas leases of the Conoco Lessors contain a provision excusing

Conoco from liability for breach of any express or implied covenant if compliance is prevented by any regulatory orders, laws, or statutes. **Source**: Oil and Gas Leases, attached as Ex. 2 to Ex. A of Conoco's motion.

10. Conoco adopted ¶ 10 of CIGE's undisputed facts listed in its summary judgment motion. In that paragraph CIGE announced its position that plaintiffs, both by mail and by publication, received sufficient notice of the Commission's proceedings. In connection with CIGE's motion, the CIGE Lessors claimed this fact was in dispute. In the pleadings relating to Conoco's motion, the notice issue is treated with less detail than that given in the pleadings relating to CIGE's motion. In any event, the Commission's 1992 order recognized proper notice had been given. 1992 Order, Findings ¶ 3.

11. Great Bear, the applicant in the proceedings for the 1992 order, assigned its rights and interest in Section 14 to Kirkland Royalty, Inc. ("Kirkland"), subsequent to the issuance of the 1992 order. **Source**: Ex. K to CIGE's motion. In response to Conoco's motion, plaintiffs claim they assigned only a portion of their interests. Plaintiffs did not challenge this information when it was raised in CIGE's motion. See CIGE's Brief at 5, ¶ 11 (Jan. 25, 1994); Plaintiffs' Brief at 1-3 (Feb. 9, 1994).

12. There is no dispute that plaintiffs entered into lease option agreements ("LOAs") with Kirkland. As a result, Kirkland is paying all the expenses of this litigation on plaintiffs' behalf and Kirkland has control of this lawsuit. **Source**: Ex. E and K to CIGE's motion. Plaintiffs respond the LOAs speak for themselves.

13. Plaintiffs Ruth Fransen, Martha Harms, and Elsie Hinz, previously entered into certain other LOAs by which they authorized Great Bear to, among other things, represent their interests before the Oklahoma Corporation Commission and they agreed to grant Great Bear an oil and gas lease contingent upon the release or cancellation of Conoco's oil and gas lease. **Source**: Ex. C to Conoco's Brief, excerpts of the depositions of Harms, Hinz. Plaintiffs do not dispute the existence of the LOAs; however, plaintiffs state they did not execute the LOAs until January 16, 1991, after commencement of the proceedings that led to the 1992 order. The existence of any previous LOAs was not addressed in the pleading relating to CIGE's motion. See CIGE's Brief at 5, ¶ 12 (Jan. 25, 1994); Plaintiffs' Brief at 1-3 (Feb. 9, 1994).

Plaintiffs offer "additional facts." Plaintiffs' Brief at 3-4 (March 9, 1994).

Conoco has discussed certain of these facts. As the Court can adequately reach all issues without reference to plaintiffs' "additional facts," they will not be reprinted here.

As stated in the contemporaneous order granting partial summary judgment to CIGE, the Commission's orders are facially valid and binding until they are modified or vacated. The Commission determined an additional well in Section 14 should not be drilled. Conoco's actions, in light of the Commission's findings, do not constitute a breach of an implied covenant. By operation of the Commission order and a provision in the parties' lease, Conoco cannot be liable for damages for failure to drill an additional well in Section 14. Accordingly, Conoco is entitled to the relief it seeks in this motion.

Plaintiffs argue the same facts that support their claim of breach of an implied duty also support their claim of breach of

a fiduciary duty. Plaintiffs' claim of breach of a covenant and breach of a duty fails as plaintiffs cannot prove an essential element -- that plaintiffs are suffering substantial uncompensated drainage and that another well should have been drilled in Section 14. See Leck v. Continental Oil Co., 971 F.2d 603, 606 (10th Cir. 1992); Ramsey Petroleum Corp. v. Davis, 85 P.2d 427, 431 (Okla. 1938). The Commission determined: 1) the owners in Section 14 are recovering their fair share of gas from the Des Moines common source of supply; 2) there is no need for an additional well to protect Section 14 from drainage; and 3) any drainage occurring in Section 14 is being compensated through other production. Moreover, even if Conoco's actions did constitute a breach, the parties' lease protects Conoco from damages where compliance is prevented by

state law, executive orders, rules, or regulations.

Conoco has moved for summary judgment on plaintiffs' request for punitive damages. Whether an award of punitive damages is appropriate under any remaining theory cannot yet be determined.

Accordingly, with the exception of the punitive damages issue, Conoco is entitled to the relief it seeks in its motion.

IT IS THEREFORE ORDERED Conoco's motion for partial summary judgment is GRANTED except as to plaintiffs' claim for punitive damages, and Conoco is entitled to judgment as a matter of law on plaintiffs' breach of the implied covenants to develop and protect against drainage and plaintiffs' claim for breach of fiduciary duty to develop and protect from drainage. A judgment will enter at the conclusion of the case.

IT IS SO ORDERED this 14 day of April, 1994.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	Filed April 14,1994
Plaintiffs	No. CIV-93-574-C
vs.	
CONOCO, INC. (formerly Continental) Oil Company) and C.I.G. EXPLORATION, INC.,	
Defendants	
vs.	
KIRKLAND ROYALTY, INC.,	
Third Party Defendant, and Additional Defendant to Counterclaims	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the Court for consideration of defendant, C.I.G. Exploration, Inc.'s ("CIGE") motion for partial summary judgment on the claims made by plaintiffs Tim Ruyle, Jeanette Stone, Cassandra Gibbons, and Del Gordon d/b/a G.M. Properties. These plaintiffs allege CIGE breached an implied covenant to further develop their mineral interests and that CIGE failed to protect the plaintiffs' mineral interests from drainage. On February 9, 1994, plaintiffs responded to CIGE's motion. On February 28, 1994, CIGE filed a reply. The following facts set out by CIGE are not disputed by the plaintiffs except where noted.

1. Section 14, Township 12 North, Range 16 West, Custer County, Oklahoma, constitutes a 640-acre drilling and spacing unit for production from the Des Moines and other common sources of supply. **Source**: Oklahoma Corporation Commission

("Commission") Order No. 143939, Ex. B to CIGE's motion.

2. The Meacham No. 1-14 Well, which produces from the Red Fork member of the Des Moines common source of supply, was completed as the unit well for Section 14 in January 1991. **Source**: 1002A Completion Report, Ex. C to CIGE's motion.

3. Conoco Inc. is the operator of the Meacham No. 1-14 Well. **Source**: Scheduling Conference Memorandum at Stipulated Facts, paragraph III.F, Ex. D to CIGE's motion.

4. CIGE is the lessee of mineral interests owned by plaintiffs Tim Ruyle, Jeanette Stone, Cassandra Gibbons, and Del Gordon d/b/a GM Properties. **Source**: Scheduling Conference Memorandum at Stipulated Facts, paragraph III.E, Ex. D to CIGE's motion.

5. The Downing No. 1-15 Well is located in Section 15 and was completed in the Red Fork member of the Des Moines common

source of supply in April 1981. Plaintiffs claim CIGE breached the implied covenants of their oil and gas leases by failing to drill an additional well to protect the leased premises from drainage allegedly caused by the Downing No. 1-15 Well. **Sources**: Deposition of Craig Borison, pp.33-35, 39-40, 43-44, Ex. E; 1002A Completion Report, Ex. F to CIGE's motion.

6. CIGE does not own an interest in the Downing No. 1-15 well. **Source**: Affidavit of Betty J. Nelson, at ¶2, Ex. G to CIGE's motion.

7. CIGE believes the leases upon which plaintiffs' claims are based expressly excuse CIGE from liability for breach of implied covenants if compliance is prevented by, or is the result of, any federal or state laws, executive orders, rules or regulations. **Source**: Oil and Gas Leases, attached as Exhibits 1 and 2 to Affidavit of Betty J. Nelson, Ex. G to CIGE's Motion.

Plaintiffs respond the leases speak for themselves, but claim there is a factual dispute regarding the circumstances and findings of the Commission's ruling on an application to drill an additional well in Section 23. See Commission Order No. 361673, Cause CD No. 158049 (Nov. 27, 1991), part of Plaintiffs' Ex. 1. (Hereafter, Commission Order No. 361673 will be referred to as "the 1991 order.") In the 1991 order, the Commission determined "its Order ... designating ... a single drilling and spacing unit for production of hydrocarbons from the Des Moinesian common source of supply ... [is] not adequate when taking into consideration the changed conditions which now prevail, as compared to conditions as known when such well pattern and density were ordered. That it is now necessary to drill an additional well ... in order to effectuate the maximum recovery of

hydrocarbons from said common source of supply." Id. at 2 ¶¶ 3-4.

8. By Order No. 362594, entered in Cause CD No. 157684 on January 13, 1992 ("1992 order"), the Commission denied the application of Great Bear Exploration, Inc. ("Great Bear") to drill an additional well in Section 14. Source: Order No. 362594, Ex. H to CIGE's motion. In the 1992 order, the Commission found:

> 5. That the evidence presented by the Applicant's expert witnesses definitively establish [sic] that the Conoco No. 1-14 Meacham well has and will continue to recover for the owners in Section 14 in their fair share of the gas in the Des Moines common source of supply. As noted in the Initial Report of the Administrative Law Judge, the Protestant's expert engineer concluded that the Meacham No. 1-14 well will recover the gas in place under Section 14. In his opinion that well would ultimately produce 20.8 BCF. Those calculations depended upon a geological map which included intervals other than that produced by the existing unit well and offset wells. Obviously, the Applicant's

contentions that a second well is necessary to effectively develop and drain Section 14 were not proven. Moreover, the Protestant's evidence showed significantly less gas to underlie Section 14. Those calculations showed only 11.5 BCF of gas recoverable from beneath Section 14. The geological foundation for such conclusion did not attempt to include unproductive Des Moines intervals. The Protestant's engineer testified that the No.1-14 Meacham well will ultimately recover 22.6 BCF of gas. Based only upon the Applicant's evidence, giving no consideration to Protestant's evidence, these applications must be denied. The Protestant's evidence simply confirms such determination.

6. That the Protestant asserts also that an additional well drilled at the location described in Cause CD No. 157683 is necessary to protect Section 14 from drainage. The evidence presented by the Applicant, and discussed above, shows such assertion to have no merit. Given the existence of a Commission created drilling and spacing unit for the Des Moines common source of supply, the Administrative Law Judge and the Appellate Administrative Law Judge correctly noted that correlative rights of all owners in the common source of supply must be considered. The mere

> fact that Applicant wants to produce more gas for Section 14 is not the controlling factor. The operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit. As noted in GMC Oil and Gas Co. v. Texas Oil and Gas Corp., 586 P.2d 731 (Okla. 1978), there is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share. Any drainage occurring in Section 14 is compensated for through production of the No. 1-14 Meacham well. To allow an additional well to be drilled and produced in Section 14 would result in damage to the correlative rights of owners in adjacent sections.

Cause CD No 157684, Order No. 362594, ¶¶ 5 and G. Plaintiffs argue the 1991 order substantiates the existence of factual disputes.

9. The 1992 order was affirmed on appeal and is a final order. **Sources:** Opinion of the Oklahoma Court of Appeals, order denying rehearing, and order denying certiorari in Case No. 79,063, Ex. I to CIGE's motion.

10. It is CIGE's position that the plaintiffs, both by mail and by publication, received sufficient notice. **Sources**: Certified copies of the 1992 order proceed ings, attached to CIGE's motion as Ex. H and J. CIGE's Ex. H is the 1992 order. CIGE's Ex. J is copies of the pleadings leading up to the 1992 order. Plaintiffs claim these same exhibits, along with their own Ex. 2, demonstrate the existence of factual disputes.

11. Great Bear, the applicant in the proceedings for the 1992 order assigned its rights and interest in Section 14 to Kirkland Royalty, Inc. ("Kirkland"), subsequent to the issuance of the 1992

order. **Sources**: Deposition of Toni Dial, President of Kirkland Royalty, Inc., at pp. 25-27, and Ex. 14 and 15 thereto, attached to CIGE's motion as Ex. K; Deposition of Craig Borison, President of Great Bear and former President of Kirkland Royalty, Inc., 86, 88-89 and Ex. 15 thereto, attached to CIGE's motion as Ex. E.

12. There is no dispute that plaintiffs "entered into agreements with Kirkland under which Kirkland is paying for all the expenses of this lawsuit on plaintiffs' behalf and under which Kirkland has control over this lawsuit." **Source:** Deposition of Craig Borison at pp.32-34, and Ex. 8 thereto, attached to CIGE's motion as Ex. E; Deposition of Toni Dial, p.48, Ex. K to CIGE's motion. Affidavit of Betty J. Nelson ¶ 3, Ex. G to CIGE's Motion. CIGE's Statement of Undisputed Material Facts, ¶ 12. However, plaintiffs claim they obtained no interest from Kirkland and direct the

Court's attention to their Ex. 3, which is copies of plaintiffs' Lease Option Agreements ("LOAs").

13. CIGE was not a party in Robert and Elizabeth Ruyle, et al. v. Continental Oil Co., No. CIV-91-379-W, United States District Court for the Western District of Oklahoma. CIGE did not acquire its interest in Section 14 from Conoco. **Source**: Affidavit of Betty J. Nelson, ¶ 3, Ex. G to CIGE's Motion.

The following is a list of plaintiffs' supplemental facts, together with CIGE's responses.

1. Plaintiffs claim since the Commission proceedings and the 1992 order, there has been a change in knowledge concerning the drainage issue. **Source**: Judgment in Ruyle v. Continental Oil Co., No. CIV-91-379-W, W.D. Okl. (Sept. 3, 1992), reflecting the jury's verdict for plaintiffs on claims of breach of implied duty to

develop, tortious breach of implied duty to protect against drainage, and breach of fiduciary duty.

2. Plaintiffs claim the drilling of another well in Section 23 establishes there has been a change in conditions since the Commission proceedings. **Source**: 1991 order permitting the drilling of another well in Section 23 to test and produce the Des Moinesian common source of supply and the judgment in Ruyle.

The 1992 order denied an application to drill an additional well in Section 14. As to the facts plaintiffs describe in ¶¶ 1 and 2 above, CIGE maintains until the 1992 order is vacated or modified, it is binding on the parties. Further, CIGE points out it was not involved in, or connected to, the Ruyle litigation.

3. Plaintiffs acknowledge the Commission determined that Section 14 was being drained. **Source**: 1992 order. CIGE

relies on ¶¶ 5 and 6 in the 1992 order as support for its position that the Commission also found the drainage was not uncompensated.

4. The 1992 order did not deal solely with the relationship between the wells located on Section 15 and Section 14, but dealt with production from all adjacent sections. **Source**: 1992 order. CIGE did not dispute this statement of fact.

5. Although plaintiffs claim it is undisputed that "CIG[E] has never taken any action to protect section 14 from drainage," this will be treated as a conclusory allegation as plaintiffs offer no support for this fact.

6. Plaintiffs have their own independent rights in Section 14 by virtue of their ownership of oil and gas minerals. **Source**: CIGE's Ex G. CIGE did not dispute this statement of fact.

7. Plaintiffs suggest since the Commission proceedings, evidence now exists to show Section 14 has been drained. Plaintiffs rely on the jury verdict in Ruyle v. Continental Oil Co., CIV-91-379W, W.D. Okla. CIGE points out it was not a party to the Ruyle litigation, or in privity with any party.

8. Plaintiffs claim some of them were not notified of the Commission's proceedings. In ¶ 10, plaintiffs state they "have never sought any relief from the [Commission]." CIGE responds that examination of the face of the Commission proceedings, the only appropriate review for this Court to conduct, establishes notice was given to all plaintiffs.

DISCUSSION

The mission of the summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

Matsushita Elec. Indus. Co.v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Advisory Committee Note to Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine issue for trial'," and summary judgment can be granted. Id., at 587 (citation omitted). Once the moving party points out the absence of evidence to create a "genuine issue" of a "material fact" on which the non-moving party bears the burden of proof at trial, the Supreme Court imposes a burden on the non-moving party. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party must set forth specific facts showing there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the

outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. The question in a case for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

The gravamen of this litigation is plaintiffs' claim that CIGE failed to develop plaintiffs' mineral interests and protect them from drainage. To prevail, plaintiffs must establish there was substantial, uncompensated drainage and that a prudent operator would have drilled another well in Section 14. Leck v. Continental Oil Co., 971 F.2d 604, 606 (10th Cir. 1992); Ramsey Petroleum Corp. v. Davis, 85 P.2d 427, 431 (Okla. 1938).

FINDINGS AND CONCLUSIONS

The parties' lease provides:

> All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules and Regulations, and this lease shall not be terminated in whole or in part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or such failure is the result of any such Law, Order, Rule or Regulation.

The Commissions' orders are facially valid. Commission orders are "regarded as prima facie, valid, reasonable and just." 52 Okla. Stat. § 111. The only avenue to review a Commission order is through an appeal to the Oklahoma Supreme Court. Id. See also SKZ,Inc. v. Petty, 782 P.2d 939, 943 (Okla. 1989) ("To be successful, a collateral challenge to a Commission order must show, from the face of the record in the prior proceedings, that at least one of three elements of jurisdiction was absent: jurisdiction over the parties, jurisdiction over the subject matter or jurisdictional power to pronounce the decision under

challenge." (citation omitted)); Drake v. Southwest Davis Unit, 698 P.2d 15 (Okla. 1985) (Clarification or review of Commission is generally limited to examination of Commission orders to determine whether the Commission is generally limited to examination of Commission orders to determine whether the Commission had jurisdiction to enter the order." (citations omitted)). The Commission's 1992 order was affirmed on appeal and is a final order.

Jurisdiction Over the Parties

Plaintiffs received notice of the proceedings that culminated in the Commission's 1992 Order. In that order, the Commission recognized proper notice had been given. 1992 Order, Findings ¶ 3 ("notice has been given in all respects as required by law and by the rules of the Commission"). Because the 1992 order recognizes proper notice was given, and because the pleadings establish notice was sent to the plaintiffs,

this Court may not consider extrinsic evidence. Kaneb Production Co. v. GHK Exploration Co., 769 P.2d 1388, 1392 (Okla. 1989); Harry R. Carlile Trust v. Cotton Petroleum Corp., 732 P.2d 438, 441 (Okla. 1986), cert. denied 483 U.S 1021 (1987). Plaintiffs' absence at the Commission's proceedings does not change this result. Swift & Co. v. Walden, 55 P.2d 71, 79 (Okla. 1935). In any event, it is undisputed that plaintiffs executed LOAs with Kirkland and that Kirkland is directing the course of this litigation. See CIGE's undisputed facts Nos. 11 and 12.

Jurisdictional Power and Jurisdiction Over the Subject Matter

The Commission had jurisdiction to determine whether an additional well should be drilled in Section 14. 52 Okla. Stat. § 87.1, 17 Okla. Stat. § 52. The Commission also had jurisdiction over the plaintiffs, as they received proper notice of the

proceedings. Plaintiffs argue they seek to enforce private, rather than public rights, and that the Commission is not the proper adjudicator of their claims. However, the real issue here is whether an implied covenant has been breached as a result of substantial uncompensated drainage. Drainage and correlative rights are directly related. Leck, 971 F.2d at 606. The Commission has jurisdiction to order the drilling of another well to protect from drainage. See generally Spaeth v. Corporation Commission, 597 P.2d 320 (Okla. 1979).

Paragraphs 5 and 6 of the Commission's 1992 order make three clear statements related to the issues now before the Court. The Commission's 1992 order provides 1) the owners in Section 14 are recovering their fair share of gas from the Des Moines common source of supply; 2) there is no need for an additional well to protect Section 14 from

drainage; and 3) any drainage occurring in Section 14 is being compensated through other production. Plaintiffs' claim that CIGE breached an implied covenant fails as a matter of law because plaintiffs cannot prove an essential element -- that plaintiffs are suffering substantial uncompensated drainage. See Leck, 971 F.2d at 606; Ramsey, 85 P.2d at 431. This conclusion was specifically addressed by the Commission when it found "[a]ny drainage occurring in Section 14 is compensated for through production of the No. 1-14 Meacham well." Having received notice of the Commission's proceedings that culminated in the 1992 order, plaintiffs are collaterally estopped from relitigating the drainage issue. See State ex rel. Barnett v. Wood, 43 P.2d 136, 138 (Okla. 1935) (quoting American Bank & Trust Co. of Ardmore v. Frensley, 30 P.2d 883 (Okla. 1934). Moreover, even if CIGE's actions did

constitute a breach of an implied covenant, the parties' lease protects CIGE from damages where compliance is prevented by state law, rule, executive orders, rules, or regulations.

Plaintiffs' contention that the 1992 order does not reach the issue of whether there was drainage before or after the entry of the 1992 order is without merit. Plaintiffs offer no evidence to support this contention.

In summary, the Commission's orders are facially valid and binding until they are modified or vacated. The Commission determined an additional well in Section 14 should not be drilled. CIGE's actions, in light of the Commission's findings, do not constitute a breach of an implied covenant. By operation of the Commission order and a provision in the parties' lease, CIGE cannot be liable for damages for failure to drill an additional well in Section 14.

Accordingly, CIGE is entitled to the relief it seeks in this motion.

IT IS THEREFORE ORDERED CIGE'S motion for partial summary judgment is GRANTED and CIGE is entitled to judgment as a matter of law on plaintiffs' claim for breach of the implied covenants to develop and protect against drainage. A judgment will enter at the conclusion of the case.

IT IS SO ORDERED this 14th day of April, 1994.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	)	Filed May 19, 1994
Plaintiffs,	)	No. CIV-93-574-C
KIRKLAND ROYALTY, INC.,	)	
Additional Plaintiff,	)	
v.	)	
CONOCO, INC. (formerly Continental) Oil Company) and C.I.G. EXPLORATION, INC.,	)	
Defendants.	)	

ORDER

Upon the Joint Motion of the Plaintiffs, the Additional Plaintiff and the Defendants in this action for a certification under Rule 54(b) of the Federal Rules of Civil Procedure and for a stay of claims against Additional Plaintiff pending appeal of final judgment, and upon review of the pleadings filed herein, the Court finds that such Joint Motion should be granted.

IT IS THEREFORE ORDERED that, based upon the showing made by the parties in their Joint Motion, the Court hereby certifies and determines pursuant to Rule 54(b) that there is no just reason for delay of an appeal of the Court's two summary judgment rulings against the Plaintiffs in this action, entered on April 14, 1994, which rulings entered judgment against the Plaintiffs on all of their claims in this action, except for the royalty under-payment claims of the Plaintiffs which counsel have

represented will be dismissed from this case without prejudice. The Court hereby directs the Clerk of the Court to reflect the entry of final judgment against the Plaintiffs with respect to such claims.

IT IS FURTHER ORDERED that the prosecution of the Defendant Conoco's claims against the Additional Plaintiff, Kirkland Royalty, Inc., is hereby stayed pending the outcome of the Plaintiffs' appeal of the Court's aforesaid Final Judgment.

IT SO ORDERED this 19 day of May, 1994.

s/ Robin J. Clauthron
ROBIN J. CLAUTHRON
UNITED STATES DISTRICT JUDGE

423.94A.MDC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	Filed June 24, 1994
Plaintiffs,	
vs.	Case No. CIV-93-574-C
CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,	
Defendants,	
vs.	
KIRKLAND ROYALTY, INC.,	
Third Party Defendant, and Additional Defendant to Counterclaims.	

O R D E R

On April 14, 1994, the Court entered its rulings on the motions for partial summary judgment. At the request of the parties by motion filed May 18, 1994, the Court entered a final entry of judgment as to the two summary judgment rulings against plaintiffs in this action. (Order, May 19, 1994). The May 19, 1994, Order also certified and determined, pursuant to Rule 54(b) that there was no just reason for delay of an appeal of the summary judgment rulings against plaintiffs.

On June 20, 1994, plaintiffs filed a motion for reconsideration of the Court's summary judgment rulings against plaintiffs. Motions to reconsider are not favored and are generally improper except where there is a new development in the law or where it is clear the Court was operating under a misconception. The ground on which the motion to reconsider is based involves plaintiffs' conclusory unsupported statement

that the decision reached by the Oklahoma Corporation Commission, which is discussed in the Court's order on the motion for partial summary judgment, "was procured through breach of defendants' fiduciary duty by opposing plaintiffs' application and also by concealment of information." Brief at 4 (June 20 1994). Not only does this allegation come too late in time to permit the Court's consideration, the avenue to review a Commission order is through an appeal to the Oklahoma Supreme Court, as the parties were previously advised. (Order, April 14, 1992)

On June 22, defendants Conoco, Inc. and C.I.G. Exploration, Inc. filed a motion for clarification. The substance of the motion is dealt with in the first paragraph of this Order. Accordingly, the motion will be denied.

IT IS THEREFORE ORDERED that plaintiffs' motion for reconsideration is

DENIED; defendants' motion for clarification is DENIED.

IT IS SO ORDERED this 24 day of June, 1994.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

(3)

No. 95-1133

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated,

Petitioners,

v.

CONOCO INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause requires, in addition to notice to interested parties of an Oklahoma Corporation Commission ("OCC") proceeding and opportunity to be heard, that such parties be given notice that the OCC's determinations may not be collaterally attacked by such parties in other proceedings.

2. Whether 52 Okla. Stat. 1991, §111 violates the Due Process Clause of the Fourteenth Amendment because it prohibits a collateral attack on an OCC order in other proceedings asserting private rights which the OCC would have lacked jurisdiction to determine.

3. Whether a party who had notice and opportunity to participate in proceedings wherein the OCC disallowed the drilling of any offset well, but voluntarily failed to participate in those proceedings, is denied due process by a state prohibition against collateral attack which prevents that party from suing the unit operator for damages for failure to drill such an offset well.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS

Respondent C.I.G. Exploration, Inc. is wholly owned by Colorado Interstate Gas Company, and has no subsidiaries.

Respondent Conoco Inc. was formerly named "Continental Oil Company" (Aplt. App. 1, caption). Its parent company is E.I. du Pont de Nemours and Company, and its subsidiaries which are not wholly owned are:

1 Big Sky Of Montana Realty, Inc.
2 C&L Processors Partnership
3 Cit-Con Oil Corporation
4 Conch International Methane Limited
5 Conoco Arabia Ltd.
6 Conoco Iraq Ltd.
7 Conoco Mexico Ltd.
8 Conoco Oriente Ltd.
9 Conoco Peru Ltd.
10 Conoco Venezuela Ltd.
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12 Du Pont Energy Company
13 Excel Paralubes
14 Felix Oil Company
15 Gulf Coast Fractionators
16 Jupiter Holding, Inc.
17 Kettleman North Dome Association
18 Marine Preservation Association
19 Nelson Industrial Steam Company (NISCO)
20 Oberrheinische Mineraloelwerke GmbH (OMW)
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STATUTORY PROVISIONS INVOLVED

52 Okla.Stat. 1991, §111 is the Oklahoma statute upon which the Tenth Circuit's decision is based. It is neither cited nor quoted in the Petition for Writ of Certiorari ("Petition"). It provides in relevant part:

> No collateral attack shall be allowed upon orders, rules and regulations of the [Oklahoma Corporation] Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders, rules or regulations to the [Oklahoma] Supreme Court.

52 Okla.Stat. (Supp. 1995), §87.1(e) provides in relevant part:

> The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the [Oklahoma Corporation] Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited.

STATEMENT OF THE CASE

Introduction and Related Case: Respondents are lessees of mineral interests in Section 14, T14N, R16W, Custer County, Oklahoma ("Section 14"). Petitioner's Appendix

("Pet. App.") 3.[1] Petitioners sued respondents in this case alleging breaches of the duty to prevent drainage by failing to cause an additional well to be drilled in Section 14. Pet.App. 4-5; Petitioners' Supplemental Appendix ("Pet.Supp.App.") 4-5, 14. The same allegations were made against respondent Conoco Inc. ("Conoco") by other mineral owners in Section 14 in *Ruyle v. Continental Oil Co.*, 44 F.3d 837 (10th Cir. 1994), *cert. denied*, 116 S.Ct. 272, *rehearing denied*, 116 S.Ct. 557 (1995).

In both cases plaintiffs sued Conoco for failing to drill an offset well to prevent alleged drainage from Section 14 into Section 15 – notwithstanding that the Oklahoma Corporation Commission ("OCC") had prohibited the drilling of such an additional well, in proceedings as to which the record shows all plaintiffs, in both this case and *Ruyle*, received notice and opportunity to be heard. The difference between this case and *Ruyle* is that in *Ruyle* the plaintiffs did participate in the OCC proceedings. In this case plaintiffs voluntarily chose not to participate.[2]

In *Ruyle* a different panel of the Tenth Circuit (with no common judges) held that plaintiffs in that case were barred by collateral estoppel, and also barred by the

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[1] The Court of Appeals' opinion does not contain the numerous typographical, spelling, and other errors (including omission of most footnote numbers) found in Petitioners' reproduction in their Appendix. The Court can still determine the footnote to which the text refers, since the Appendix does keep footnotes on the same pages as the corresponding text footnote numbers.

[2] Plaintiffs here are represented by the same counsel as were petitioners in *Ruyle* in the Tenth Circuit and in this Court.

prohibition on collateral attacks from seeking damages from Conoco based on its failure to drill a well which the OCC had already disallowed. *Ruyle, supra,* 44 F.3d at 843-45. In the instant case, the Tenth Circuit applied only the latter of these two doctrines, that which prohibits a collateral attack on OCC orders, and did not reach the issue of collateral estoppel. Pet.App. 14-15.[3]

An understanding of the basis of the Tenth Circuit's decision requires discussion of the underlying OCC proceedings.

OCC Proceedings: On August 7, 1978 the OCC established Section 14 and adjacent sections as single drilling and spacing units of 640 acres each for production from a common source of supply, pursuant to 52 Okla.Stat. (Supp. 1995), §87.1(a). 10th Cir. Supp. App. 11.[4] The spacing order allowed a single well to be drilled in Section 14, and Conoco was designated the operator of that well. Oklahoma statutory law prohibited anyone including respondents from drilling any further wells into the spacing unit, except as permitted by the OCC. 52 Okla.Stat. (Supp. 1995), §87.1(e), quoted above.[5]

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[3] Petitioners' assertion that the Tenth Circuit opinion "divests hundreds of thousands of individuals who have legitimate claims against their lessees for fraudulent drainage" (Petition at 3) is wholly unsupported by the record and incorrect.

[4] References to "10th Cir. Supp. App." are to the December 13, 1994 Supplemental Appendix of Appellees in the Tenth Circuit in this case.

[5] "Under Oklahoma law, only one well is permitted in a spacing or drilling unit, such as section 14, unless the OCC authorizes an additional well." Pet.App. 19.

In 1992 the OCC denied an application of Great Bear Exploration, Inc. ("Great Bear") to drill an additional well in Section 14 to protect the unit well from drainage. Pet.App. 5-6. Both lower courts found that the record showed that petitioners here were duly notified of the Great Bear proceeding (Pet.App. 5, Pet.Supp.App. 30-31); the OCC specifically found that notice had been given in all respects as required by law and the OCC's own rules. *Id.*; 10th Cir. Supp. App. 44, ¶3. Petitioners' assertions that the notices sent to them "did not inform [them] of the purpose of the proceedings before the Commission" and that they "were not informed that the proceedings had to do with drainage issues" (Petition at 7) are incorrect.[6] Additionally, each of petitioners' leases expressly provided that the lessees would be excused from liability for failure to perform any provision of the lease, where performance was prevented by any federal or state law, executive order, rule or regulation, or similar agency action. Pet.App. 19-20. Thus petitioners also had actual knowledge that the OCC proceedings would affect respondents' obligations under their leases.[7]

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[6] The notice was accompanied by the application which included Great Bear's allegations of the need for an additional well (10th Cir. Supp. App. 52). Petitioners were also mailed separate notice of the hearing on the application. *Id.* at 68. Before the hearing petitioners were mailed additional notice of a separate amended application and notice of hearing. *Id.* at 93 and 102. As to drainage, *see* Pet.App. 48 n.14.

[7] Three of the petitioners here had even entered into agreements "authorizing Great Bear to act on their behalf to have another well drilled in section 14." Pet.App. 11-12.

In the Great Bear proceedings, the OCC rejected the contention that an additional well was needed to protect Section 14 from drainage, found that any drainage that was occurring was compensated by counter-drainage into Section 14,[8] and found that another unit well would injure correlative rights of mineral owners in adjoining units. Pet.App. 6. The OCC expressly found that the existing well "has and will continue to recover for the owners in Section 14 . . . their fair share of the gas in the Des Moines common source of supply." Pet.Supp.App. 18. The OCC held:

> The operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit. As noted in *GMC Oil and Gas Co. v. Texas Oil and Gas Corp.*, 586 P.2d 731 (Okla. 1978), there is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share.

Pet.Supp.App. 20. The OCC found that an additional well would violate the rights of owners in other sections

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[8] Uncompensated drainage, *i.e.*, drainage not compensated by counter-drainage, is the test for whether an additional well within an OCC drilling and spacing unit is warranted. *Leck v. Continental Oil Co.*, 971 F.2d 604, 606 (10th Cir. 1992). Drainage and correlative rights are "directly related." *Id.* at 606.

adjoining Section 14. Pet.App. 6. The OCC thus denied the application to drill another well. Pet.Supp.App. 19-20.

The OCC's order was affirmed on appeal by the Oklahoma Court of Appeals, and the Oklahoma Supreme Court denied review by certiorari. Pet.App. 6-7; Pet.Supp.App. 21.

Throughout all of these proceedings respondents remained prohibited by Oklahoma statutory law and the OCC's original spacing order from drilling an additional well into Section 14 – as were all parties including petitioners and Great Bear. This prohibition has continued from the time the spacing unit was established, throughout the OCC proceedings and affirmance of the OCC's order rejecting the application for another well, and was still in effect when this brief was filed.

Lower Court Proceedings: After Great Bear failed to prevail in the OCC, petitioners here each entered into contracts with Great Bear's assignee, Kirkland Royalty, Inc., authorizing Kirkland to protect their interests in Section 14. Pet.App. 7; Pet.Supp.App. 7. "Kirkland brought this action on behalf of the plaintiffs [*i.e.*, petitioners here] and is controlling and paying for this litigation." Pet.App. 7.[9]

Petitioners here, like plaintiffs in *Ruyle*, brought this action against respondents for failure to cause the drilling

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[9] Kirkland is also named as an additional plaintiff and appellant in the proceedings below. Pet.App. 1.

of an additional well in Section 14 which was indisputably prohibited by state law.[10] In *Ruyle* the district court submitted the claim to jury trial, and the Tenth Circuit reversed. In the instant case a different district judge granted partial summary judgment (before the reversal in *Ruyle*) (Pet.Supp.App. 1, 13), and the Tenth Circuit affirmed.

The Tenth Circuit based its decision in this case on Oklahoma's prohibition on collateral attacks of OCC orders, *see* 52 Okla.Stat. 1991, §111 (Pet.App. 14-15), an issue not addressed in the Petition. The court held that "the trial court correctly concluded that Conoco and CIGE did not breach any duty to the plaintiffs by not drilling a well they could not lawfully drill." Pet.App. 21.

The court held that if plaintiffs wanted relief from the order prohibiting an additional well in Section 14, they could apply to the OCC. Pet.App. 50-51. Moreover, the court held, to the extent that plaintiffs' claims were based on allegations that Conoco misrepresented facts to the OCC, that also was a matter to be presented to the OCC. *Id.*[11]

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[10] Petitioners' assertion that respondents were required to seek further relief from the OCC notwithstanding its order, and regardless of the previously determined adverse effect on correlative rights of other mineral owners, is contrary to Oklahoma law (Pet. App. 21-23, 29-31).

[11] Petitioners' incorrect assertion that Conoco manipulated facts (with "two sets of data") in the OCC proceedings in which petitioners did not participate (Petition at 4) illustrates the kind of collateral attack which Oklahoma law prohibits. Any attempt to avoid the effect of the OCC order based on intrinsic fraud must be presented to the OCC. *See* Pet.App. 23-25, 50-51. *Leck v.*

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS PROPERLY APPLIED OKLAHOMA LAW PROHIBITING COLLATERAL ATTACKS

The first question presented (Petition, p.i) is one expressly *not* reached by the Court of Appeals (Pet.App. 14-15); it is among those noted in the court's footnote 3 (Pet.App. 15).[12] Petitioners ignore the ground upon which the Court of Appeals *did* base its decision – that petitioners are prevented from collaterally attacking the OCC order regardless of collateral estoppel.[13]

The Court of Appeals noted in its opinion that "a person can be barred from collaterally attacking an order entered in a proceeding to which he or she was not a

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Continental Oil Co., 800 P.2d 224, 230 (Okla. 1989); 52 Okla.Stat. 1991, §§111 and 112.

[12] Petitioners do not concisely frame the issue here, but in the Court of Appeals they argued that they could not be collaterally estopped without receiving notice specifically stating that the OCC would consider claims of drainage from Section 14 in determining whether to allow the proposed additional well. As the Court of Appeals states in its opinion (Pet.App. 48 n.14):

> The OCC could only authorize another well in section 14 to prevent waste or to protect correlative rights. *See* Okla. Stat. Ann. tit. 52 §87.1(a). Drainage is perhaps the most common factor affecting correlative rights. [Citation omitted.] We believe the plaintiffs were sufficiently apprised of the fact that drainage could be an issue in the OCC proceedings.

[13] They also gave relatively little attention to the issue in the Court of Appeals, although it was a primary focus of respondents' briefs.

party." Pet.App. 15. While the record shows that petitioners were given notice and opportunity to participate in the OCC proceedings and elected not to participate, petitioners neither acknowledge nor challenge the Court of Appeals' holding that it is irrelevant to its decision whether they were parties at all.

In any event, the collateral attack doctrine was correctly applied. 52 Okla.Stat. 1991, §111 provides:

> No collateral attack shall be allowed upon orders . . . of the Commission made hereunder, but the sole method of reviewing such orders and inquiring into and determining their validity, justness, reasonableness or correctness shall be by appeal from such orders . . . to the Supreme Court.[14]

Thus when a party, "although having legal notice, failed to appear and participate in the original hearing" before the OCC, that party may not collaterally attack the OCC's order which has become final. *Phillips Petroleum Co. v. Corporation Comm'n*, 482 P.2d 607, 610-11 (Okla. 1971).[15] Other jurisdictions apply similar rules forbidding collateral attacks on the orders of their respective oil and gas boards or commissions.[16]

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[14] *See Woods Petroleum Corp. v. Sledge*, 632 P.2d 393, 396 (Okla. 1981).

[15] *See also Drake v. Southwest Davis Unit*, 698 P.2d 15, 16-17 (Okla. 1985); *Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209, 212 (Okla.Ct.App. 1987).

[16] *Mize v. Exxon Corp.*, 640 F.2d 637, 640 n.3 (5th Cir. 1981) (citing illustrative authorities from other jurisdictions).

The only method to successfully launch a collateral attack on an OCC order is to show on the face of the order that it is void because the OCC lacked jurisdiction over the subject matter, the parties, or to pronounce the particular decision.[17] Although the OCC's jurisdiction to issue the order may be challenged at any time, and the OCC always has power to change its order based on changed conditions, any other attempted modification of the order is a prohibited collateral attack.[18] Even the OCC may not collaterally attack one of its prior orders which it had jurisdiction to issue, although the OCC may supplement or clarify the order.[19]

A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of the OCC's decision in an incidental proceeding other than by appeal, writ of error, certiorari or motion for new trial. Pet.App. 16.[20]

> [Oklahoma's] protection against an impermissible collateral attack prevents both the district court and the Commission from encroaching

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[17] *SKZ, Inc. v Petty*, 782 P.2d 939, 943 (Okla. 1989); *Wagner & Brown v. Ward Petroleum Corp.*, 876 F.Supp. 255, 258 (W.D.Okla. 1994).

[18] *Inexco Oil Co. v. Oklahoma Corporation Comm'n*, 767 P.2d 404, 406 (Okla. 1988), *cert. denied sub nom. Ward Petroleum Corp. v. Louisiana Land and Exploration*, 490 U.S. 1040 (1989).

[19] *Kaneb Production Co. v. GHK Exploration Co.*, 769 P.2d 1388, 1391-92 (Okla. 1989).

[20] *Woods Petroleum Corp. v. Sledge*, 632 P.2d 393, 396 n.4 (Okla. 1981); *Holder v. Genie Oil & Gas Corp.*, 885 P.2d 1388, 1391 (Okla.Ct.App. 1994); *Kaneb Production Co. v. GHK Exploration Co.*, 769 P.2d 1388, 1391 (Okla. 1989); *State ex rel. Commissioners of the Land Office v. Corporation Comm'n*, 590 P.2d 674, 677 (Okla. 1979).

> upon each other's jurisdiction by entertaining inquiries into issues that stand decided by the other tribunal.[21]

An action asserting a claim which seeks relief at variance with an OCC order or requires an interpretation of the order constitutes a prohibited collateral attack. *E.g., Woods Petroleum Corp. v. Sledge*, 632 P.2d 393 (Okla.1981) (quiet title action); *Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209 (Okla.Ct.App. 1987) (action seeking damage for conversion, discussed below); *Drake v. Southwest Davis Unit*, 698 P.2d 15 (Okla. 1985) (action for accounting); *Shell Oil Co. v. Keen*, 355 P.2d 997 (Okla. 1960) (action for accounting).

Pelican Production Corp. v. Wishbone Oil & Gas, Inc., 746 P.2d 209 (Okla.Ct.App. 1987) illustrates the application of these principles in analogous circumstances.[22] In *Pelican* two oil and gas companies had drilled wells into the same section. One company sued the other alleging conversion of oil and gas from the formation for which its well had been designated as the unit well. *Id.* at 211. The same contention had been previously made to, and rejected by, the OCC. The district court dismissed for lack of subject matter jurisdiction, holding that the action constituted a collateral attack on the OCC's order. *Id.* On appeal, the Court of Appeals acknowledged that the OCC had no power to award damages in a private lawsuit for

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[21] *Fent v. Oklahoma Nat. Gas Co.*, 898 P.2d 126, 135 (Okla. 1994).

[22] *Pelican* has persuasive but not precedential value under Oklahoma's court rules. 12 Okla. Stat. Ch. 15, App. 2, Rule 1.200.C(B). *See* Pet.App. 40, n.10.

conversion. However, the court affirmed, holding the district court had properly concluded that it lacked subject matter jurisdiction since the OCC's determination that the defendant was not in violation of its drilling and spacing order precluded any lawsuit for conversion. *Id.* at 212. The court observed that the OCC's order had become final, and that the plaintiff was "attempting to relitigate this issue in district court and, thus, is attacking the Commission's order collaterally." *Id.*

Other states similarly forbid a mineral lessor's claim based on alleged drainage which would constitute a collateral attack on the relevant oil and gas board or commission's orders.[23]

Here, the OCC has established Section 14 as a drilling and spacing unit and has rejected petitioners' efforts to drill more than the single allowed well in the unit. Petitioners' action against respondents for actual and punitive damages because of their *failure* to drill the well which the OCC has expressly disallowed, and which is otherwise prohibited by law, is an impermissible collateral attack on the OCC's orders. Pet.App. 19, 21.

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[23] *E.g., Trahan v. Superior Oil Co.*, 700 F.2d 1004, 1015-19 (5th Cir. 1983) (applying Louisiana law); *Mize v. Exxon Corp.*, 640 F.2d 637, 639-40 (5th Cir. 1981) (applying Alabama law); *Amoco Production Co. v. Heimann*, 904 F.2d 1405, 1417 (10th Cir.) (applying New Mexico law), *cert. denied*, 498 U.S. 942 (1990); *Mayer v. Tidewater Oil Co.*, 218 F.Supp. 611, 612-15 (W.D.La. 1963) (applying Louisiana law).

II. DUE PROCESS DOES NOT REQUIRE SPECIAL NOTICE OF THE POTENTIAL LEGAL EFFECT OF FOREGOING THE OPPORTUNITY TO BE HEARD

Petitioners' assertions that they were not notified of the purpose of Great Bear's application are contrary to the record, as recited above. However, petitioners also suggest that due process requires notice of the legal effect of the OCC's order on later possible proceedings,[24] a contention which was directed by petitioners to avoiding collateral estoppel in the Court of Appeals.[25]

If petitioners now mean to argue that due process required notice to them that an OCC order could not be collaterally attacked, petitioners cite no authority for the assertion and respondents are aware of none. Due process does not require notice of the application of a rule of law that uniformly applies to all citizens, nor must an individual be given special "advance notice before such a rule of law may operate." *Texaco, Inc. v. Short*, 454 U.S. 516, 537 (1982) (applying doctrine to Indiana statute causing severed mineral interests unused for 20 years to revert to surface owner). Further, there is no requirement even under preclusion doctrines that the precluded party be given notice in the prior proceeding that an unfavorable adjudication may be invoked against that party on

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[24] "The defendants never gave plaintiffs any notice that either would seek to use the proceedings before the Commission to pre lude their day before a court that could provide plaintiffs redress for their private claims." Petition at 7.

[25] The Court of Appeals accordingly found it unnecessary to reach the assertion. Pet.App. at 14 n.3.

related issues in later proceedings. *Cf.*, RESTATEMENT (SECOND) OF JUDGMENTS §§18-24 (claim preclusion), §§27-28 (issue preclusion).

The notice required by due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *GAC Enterprises, Inc. v. Medaglia (In re Medaglia)*, 52 F.3d 451, 455 (2d Cir. 1995). The purpose of the notice is to inform the recipient of the pendency of the matter in which his protected interests are at stake. *Moreau v. F.E.R.C.*, 982 F.2d 556, 569 (D.C.Cir. 1993).[26]

All OCC adjudicative proceedings must be accompanied by notice which satisfies federal and state due process standards. *Harry R. Carlile Trust v. Cotton Petroleum Corporation*, 732 P.2d 438, 442-44 (Okla. 1986), *cert. denied*, 483 U.S. 1021 (1987). Oklahoma requires service by mail whenever possible to ensure actual knowledge, *id.* at 444.

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[26] Even a person who receives no notice, but who has actual knowledge of the proceeding, has no complaint of denial of due process where the exercise of due diligence would have allowed preservation of the rights determined. *GAC Enterprises, supra; Moreau, supra.* Here, aside from the technical notices to petitioners shown by the record, petitioners had actual knowledge of their own lease provisions which made the lessees' obligations subject to all orders of the OCC. Pet.App. 5, 19-20.

Defendants cite *Hansberry v. Lee*, 311 U.S. 32 (1940) for the assertion:

> Due process requires notice of defendants' intentions in the Oklahoma Corporation Commission or a finding that plaintiffs had been adequately represented.

Petition at 7. In *Hansberry* the question was whether *res judicata* operated against an absent class member with whom the class representative had potentially conflicting interests. *Hansberry* is not apposite to the Court of Appeals' application of Oklahoma's prohibition on collateral attacks of OCC orders, 52 Okla.Stat. 1991, §111, to prevent petitioners from seeking damages against respondents for obeying OCC's specific order and Oklahoma statutory law prohibiting an additional well in Section 14.

Due process does not require special notice of the potentially preclusive effect of an adjudication in other proceedings, and certainly does not require notice before applying the prohibition on collateral attacks.

III. A COLLATERAL ATTACK ON AN OCC ORDER DOES NOT BECOME PERMISSIBLE ON THE GROUND THAT THE OCC CANNOT ADJUDICATE THE CLAIM THROUGH WHICH THE COLLATERAL ATTACK IS MADE

Petitioners' second proposition urges that they may not be "deprived of their claims" by a prior OCC decision unless the OCC had jurisdiction to adjudicate those claims. Petitioners' argument to this effect in the Court of

Appeals was, like their other ones, directed only to avoiding collateral estoppel. Petitioners attempt to adapt the argument to their petition by eschewing use of the term "collateral estoppel".

Petitioners cite and quote at length one case in support of their assertion. *Leck v. Continental Oil Co.*, 800 P.2d 224 (Okla. 1989). *Leck* was a decision on a certified question from the Tenth Circuit, and the Oklahoma Supreme Court expressly did not reach the issue of the preclusive effect (under either *res judicata* or collateral estoppel) of the OCC's findings because it was "not ripe for review." *Id.* at 228. However, after the certified questions were answered, both the district court and the Tenth Circuit did address the preclusion issue, holding opposite to petitioners' contentions here. *See Leck v. Continental Oil Co.*, 971 F.2d 604, 606-607 (10th Cir. 1992) (not cited by petitioners), holding that the mineral owners were precluded by a prior OCC order from seeking damages for failing to protect the unit from drainage. *Id.* at 605-606.

In *Leck*, the OCC had previously rejected an application to restrict production of a well in an adjoining unit because of alleged drainage. *Id.* at 606. Notwithstanding that the OCC did not have jurisdiction to adjudicate the private drainage claims asserted in the *Leck* litigation, the Tenth Circuit held those claims to be precluded by the OCC's order, since: "Implicit in the Commission's order denying Leck's application is a finding that the Wosika well was not causing substantial uncompensated drainage from the Leck unit." *Id.* at 606. Thus, the ultimate decision in *Leck*, by the certifying court, stands for the

opposite proposition for which petitioners cite the decision answering the certified question (where the court expressly did not reach the preclusion issue).

Petitioners' contention is also directly contrary to numerous authorities cited in Proposition II, where the collateral attack doctrine was applied regardless of the fact that the board or commission could not adjudicate the private claim. *E.g., Pelican Production Corp. v. Wishbone Oil & Gas, Inc.*, 746 P.2d 209, 212 (Okla.Ct.App. 1987) (explicitly stating the OCC would have no jurisdiction over the conversion suit, but still applying collateral attack doctrine).[27]

Petitioners note in their statement of the case (and do not again mention) the Tenth Circuit's disavowal of overly broad dictum in *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir.), *cert. denied*, 375 U.S. 942 (1963) that an administrative tribunal's decision cannot have preclusive effect in a tort action. *See* Pet. App. 41-46, especially 44-46. In *Tidewater* the court held that a Kansas Corporation Commission order allowing water flood operations did not prevent plaintiffs' action for damages for trespass and nuisance for the destruction of their wells. The Commission had only *permitted* the flooding operations (not mandated them), and expressly stated in its order that " 'an action for damages for the flooding of producing wells may be available to the owners of such wells. . . . ' " 320 F.2d at 160. *See* Pet.App. at 41-42. The court recognized that the Commission's order was impervious to a

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[27] *See also* the Oklahoma quiet title and accounting cases cited with *Pelican, supra*, and the drainage cases from other jurisdictions cited in note 23.

collateral attack insofar as it allowed the water flood operations. *Id.* at 161. Moreover, the court reversed the punitive damages awarded notwithstanding that the Commission had expressly held it was not deciding any right to future actions for damages, because the operations were done under color of that Commission's permission. *Id.* at 165. This in itself is inconsistent with the dictum on which petitioners rely, as the Court of Appeals noted. Pet.App. 46 n.11.

Here, of course, respondents and all others were *prohibited* by the OCC's order from drilling another well. Plaintiffs did not sue respondents for failing to take an action within their lawful prerogative – but for failure to defy the lawful order of the OCC and Oklahoma statutory law prohibiting any additional well. Pet.App. 44. *Tidewater* is on its face of no assistance to petitioners in resisting Oklahoma's statutory prohibition on collateral attacks of OCC orders.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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